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Date: **19 October 2015**

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

The African Union's *Amicus Curiae* Observations on the Rule 68 Amendments at the Twelfth Session of the Assembly of States Parties

Source: African Union Commission, represented by Prof. Charles Chernor Jalloh

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

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I. Introduction and Procedural History

1. The appeal of Mr William Samoei Ruto and Mr Joshua Arap Sang against Trial Chamber V(A)'s *Decision on Prosecution Request for Admission of Prior Recorded Testimony*[1] (the "Impugned Decision") is presently before the Appeals Chamber.

2. On 5 October 2015, the African Union Commission ("AUC"), represented by Prof. Charles Chernor Jalloh, sought leave to submit *amicus curiae* observations.[2] That request was based on an unprecedented decision of the African Union Assembly of Heads of State and Government directing the AUC to seek standing to join this proceeding "for the purposes of placing before the Court all the relevant material arising out of the negotiations"[3] of Rule 68 of the *Rules of Procedure and Evidence* ("RPE") during the 12th Session of the Assembly of States Parties ("ASP") in November 2013.

3. This Chamber granted the AUC leave to submit observations on 12 October 2015.[4] In accordance with that decision, which offers welcome precedent for a new type of AU-ICC dialogue, we hereby gratefully offer observations on this novel Rule 68 issue that is of considerable interest to the ICC's 34 African States Parties. We focus solely on the central question in this appeal, namely, whether the November 2013 amendment to Rule 68 can be applied in the present case without offending Articles 24(2) and 51(4) of the Statute.[5]

4. In sum, for the reasons set out below, the AUC submits that amended Rule 68 cannot apply to this case because this would violate several fundamental provisions of the ICC Statute including Articles 24(2), 51(4) and 67. By holding otherwise, the Trial Chamber erred. This regrettable error carries significant potential to undermine the fairness of the trial. Fortunately, under settled case law, the lower court's mistaken legal interpretation is not entitled to any appellate deference.[6] Thus, as the final arbiter of the

[1] ICC-01/09-01/11-1938- Red-Cor., 19 August 2015.
[2] "African Union Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence on the Rule 68 Amendments at the Twelfth Session of the ICC Assembly of States Parties" dated 5 October 2015, ICC-01/09-01/11-1983-Anx, annexed to the "Registry Transmission of a submission received from the African Union Commission, represented by Prof. Charles Chernor Jalloh", ICC-01/09-01/11-1983.
[3] Assembly/AU/Dec.586 (XXV), 15 June 2015.
[4] Decision on applications for leave to submit *amicus curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence, ICC-01/09-01/11-1987, 12 October 2015.
[5] ICC-ASP/12/Res.7, 27 November 2013.
[6] ICC-02/05-03/09-295 OA 2, para. 20.

law applicable before this Court, this Chamber should clarify the relevant principles and reverse the Impugned Decision.

II. Justifications for Adoption of Amended Rule 68 Do Not Support Retroactive Application

5. In construing the new Rule 68, recourse must first be had to the ordinary meaning of the terms of the provision viewed in their context and in light of its object and purpose.[7] Reference may also be made to supplementary means of interpretation, including the preparatory work. In a system such as the ICC's where the States Parties are ultimately responsible for adopting and amending the rules that the judges must then apply, the *travaux préparatoires* is invaluable in discerning the legislative will.[8] The value of this documentation is magnified in the ICC context and stands in sharp contrast to the practice at the ICTs, where adoption and amendment of procedural rules is the exclusive domain of the judges.

6. Perhaps the most salient explanation of the rationale for the concerned amendment stems from the Working Group on Lessons Learnt ("WGLL"), whose draft of new Rule 68 was eventually adopted by the ASP.[9] The WGLL explains that the overall purpose of the proposed chance was "to reduce the length of ICC proceedings and to streamline evidence presentation"[10] given the relative rarity with which the original, more restrictive Rule 68 had been applied in ICC practice.[11] To achieve that goal, the WGLL suggested expanding Rule 68 to include "three additional instances in which prior recorded testimony may be introduced in the absence of the witness"[12] derived from the ICTY's RPE. In particular, the WGLL suggested adding analogues to ICTY Rules 92 *bis*, 92 *quater* and 92 *quinquies* to the ICC's RPE. In the WGLL's view, these rules provide for admission of reliable prior recorded testimony where "[1] The prior recorded testimony goes to the proof of a matter other than the acts and conduct of the accused; [2] The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally; [and 3] The prior

[7] *See* Articles 31 (general rule of interpretation) and 32 (supplementary means of interpretation), VCLT.
[8] Article 51, ICC Statute.
[9] ICC-ASP/12/37/Add.1, annex II.A.
[10] WGLL Proposal, para. 8.
[11] WGLL Proposal, para. 3.
[12] WGLL Proposal, para. 3.

recorded testimony comes from a person who has been subjected to interference."[13] Despite basing the amendments on ICTY rules, the WGLL warned that "the ICTY is a more adversarial based legal system than the ICC, and this may mean that specific ICTY rules do not always translate into the ICC statutory scheme."[14] Furthermore, the WGLL cautioned against slavish adoption of ICTY decisions, observing that "[a]lthough meaningful insight can be gained" from that source, "the tensions created by adding exceptions to the right of the accused to examine witnesses against him or her should be borne in mind."[15] They also emphasised due regard to fairness and fidelity to the rights of the accused at all times.

7. In each of these circumstances, the WGLL considered that the term "prior recorded testimony" should be "understood to include video or audio recorded records, transcripts and written witness statements."[16] As this definition was consistent "with the prevailing jurisprudence to date," the WGLL considered it to be "unduly restrictive to understand [the term] in a more restrictive manner."[17]

8. Among the additions to Rule 68 was a provision allowing for introduction of prior recorded testimony where the "prior recorded testimony comes from a person who has been subjected to interference."[18] This clause of amended Rule 68 is especially germane to the present appeal, as the Prosecution has alleged a broad-based and concerted effort to intimidate witnesses into changing their testimony. According to the WGLL, this provision was intended as an analogue to ICTY Rule 92 *quinquies*.[19]

9. In creating an avenue for admission of testimony under this provision, the WGLL explicitly adopted a deterrence rationale, saying that the rule "creates a broader disincentive for interested persons to interfere with ICC witnesses. In particular, this provision may have a deterrent effect, in that there will be no benefit to interfering with a

[13] WGLL Proposal, para. 7.
[14] WGLL Proposal, para. 4.
[15] WGLL Proposal, para. 4, fn. 4.
[16] WGLL Proposal, para. 13.
[17] WGLL Proposal, para. 13.
[18] ICC RPE Rule 68(2)(d).
[19] WGLL Proposal, para. 31, fn 26. Notably, the *Seslj* decision that the Trial Chamber used to reach the Impugned Decision considered ICTY Rules 92 *bis*, 92 *ter* and 92 *quater*. The *Seslj* Trial Chamber did not address the applicability of the prohibition on retroactive application to the ICTY's rule regarding witnesses who have allegedly been subject to interference. As such, the persuasive value of that opinion is substantially reduced. See "Redacted Version of the Second Decision on the Prosecution's Consolidated Motion Pursuant to Rules 89(F), 92 *bis*, 92 *ter* and 92 *quater* of the Rules of Procedure and Evidence filed Confidentially on 27 February 2008" *Prosecutor v. Vojislav Seslj*, IT-03-67-T, 27 February 2008.

witness if their prior recorded testimony can be admitted to the Trial Chamber as evidence."[20]

10. From the WGLL's Report, it seems obvious that the adoption of amended Rule 68 was meant to serve two main functions. As regards the entire rule, the thrust of the amendments was to streamline the presentation of evidence as a means of reducing the length of ICC proceedings. With specific reference to Rule 68(2)(d), the WGLL propounded a deterrence rationale, wherein the purported benefits of witness interference would be nullified by the introduction of the prior testimony. The overarching goal of efficient presentation of evidence was accepted by the Study Group on Governance ("SGG")[21] as well as the ASP's Working Group on Amendments ("WGA").[22]

11. The WGA report recorded the hesitation of some State participants when the proposal was brought forward. "Some delegations who originally had concerns expressed appreciation that those concerns had been addressed and that these amendments appeared to help expedite the workings of the Court in addition to providing safeguards for the rights of the accused."[23] In assessing the will of the legislature, with specific reference to the concerns expressed by States Parties, the AUC urges this Chamber to consider the means by which these originally hesitant delegations were brought on-board. This may in turn require an inquiry that extends well beyond the limited drafting history consulted by the Trial Chamber, to among other sources, the additional transcribed speeches set out in Part VII (below).

12. The ASP plenary ultimately adopted the proposed amendments by *consensus* on 27 November 2013. The Resolution adopting, *inter alia*, the amended Rule 68 explicitly "*emphasizes* article 51, paragraph 4, of the Rome Statute" with regard to application of the Rule.[24] Article 51(4) provides that "[t]he [RPE], amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the [RPE] as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted."[25] The explicit message in this text should be self-evident. It affirms in plain language that States Parties in their

[20] WGLL Proposal, para. 34.
[21] ICC-ASP/12/37, para. 19.
[22] ICC-ASP/12/44, para. 8.
[23] ICC-ASP/12/44, para. 10.
[24] ICC-ASP/12/Res.7.
[25] Article 51(4), ICC Statute.

wisdom never aimed to pass the cost of any rule change on to the unsuspecting African accused presently before the Court, in naked violation of core statutory provisions.

13. In the AUC's considered opinion, neither the Impugned Decision nor the Prosecutor's submissions have adequately explained the ASP's decision to specifically reference Article 51(4) of the Statute. Yet, it should be apparent that, as the forum for States in the ICC system, there should be deference to decisions of the ASP as legislators without which the efficacy and legitimacy of the Court's work may be seriously undermined or hampered.

III. The present admission does not serve the purposes of the amendments.

14. With the two principal WGLL objectives in mind, that is A) *streamlining proceedings* and B) *deterring witness interference*, the AUC submits that the admission of evidence granted by the Impugned Decision serves neither.[26]

A. Admission will not streamline proceedings

15. With regard to the efficient evidence presentation argument, the facts of the present appeal must be weighed. In this regard, the AUC noted that party submissions and judicial decisions below have understandably been filed *confidentially* and public documents *redacted*. As such, we are unable to address the specific fact scenarios for each challenged witness. Notwithstanding, the redacted public documents reveal significant elements addressing the stated rationale of the amendments.

16. In particular, the Prosecutor sought to introduce statements written by personnel from her Office and subsequently adopted by witnesses. Some of these witnesses appeared before the Trial Chamber to offer *viva voce* testimony subject to cross-examination by the Defence. In so doing, two important ICC principles were promoted, namely that of orality[27] and that of an accused's right to confront witnesses against them.[28] The Prosecution was dissatisfied with the in-court testimony, arguing that the witnesses changed their testimony in material respects since their OTP interviews.[29]

[26] That the admissibility assessment for a given piece evidence is a separate question from the evidentiary weight that may be later attached to it by the judges is conceded. This, however, does not address the underlying difficulty of compliance with fundamental fairness principles which remains.
[27] Article 69(2), ICC Statute.
[28] Article 67(1)(e), ICC Statute.
[29] "Public redacted version of 'Prosecution's request for the admission of prior recorded testimony of [REDACTED] witneses", ICC-01/09-01/11-1866-Red, 12 May 2015 (hereinafter "Prosecution Request").

Accordingly, the Prosecution sought to introduce prior statements adopted by the witnesses, for the truth of their contents, and to be considered as more representative of the truth than *viva voce* testimony given in-person and under oath.[30]

17. It is submitted that, at least in cases where prior recorded testimony is used to rebut in-court testimony, the introduction of such prior testimony serves to *increase*, and not to *reduce*, the length of proceedings. This application of the Rule essentially adds an extra step to the introduction of any witness testimony. If either party is dissatisfied with a particular witness's in-court testimony, resort may be had to a Rule 68 application. This application will most certainly be challenged by the opposing party, and will require the Trial Chamber's consideration, even if it is eventually denied.

18. Further, if the application is granted, the Trial Chamber is faced with competing testimony from the same witness as regards the same events. While the AUC is confident that the task of weighing this competing evidence for any probative value is not beyond the ken of the eminent and respected members of the bench, it does add needless complexity to already difficult exercises of judicial competence.

19. With these reflexions in mind, and given the implications for other ICC trials, the provisions of Rule 68 allowing for admission of prior recorded testimony must be strictly construed. Rule 68(2) purports to apply to situations where "the witness who gave the previously recorded testimony is not present before the Trial Chamber." Rule 68(2)(d)(i), listing the factors which must accompany the introduction of prior recorded testimony of witnesses who have been subject to interferences, seems to permit some derogation from that requirement by equating a person who "has failed to attend as a witness" with one who "having attended, has failed to give evidence with respect to a material aspect of his or her prior recorded testimony." Strict construction of this equation is urged, such that a witness who presents *different* evidence is not found to be the functional, legal equivalent of one who presents no evidence at all.

B. Admission of this evidence cannot deter past conduct

20. The WGLL's rationale in providing for introduction of prior recorded testimony of witnesses who have been subjected to interference was to create a "disincentive for

[30] The AUC urges the Chamber to consider the distinction between giving *different* testimony and providing no testimony at all.

interested persons to interfere with ICC witnesses" and thus to deter such interference.[31] It is submitted that, as a purely logical matter, this purpose cannot be served by the introduction of evidence here at issue.

21. Deterrence is a necessarily prospective rationale, since deterrence of past conduct is a logical impossibility.[32] In adopting Rule 68(2)(d), the ASP made clear that it's goal was to protect witnesses from interference. The change in procedure that animated that goal may very well have had that effect on those who would otherwise have unduly influenced witnesses. But it cannot be said to have had the same effect for witnesses whose interference was a *fait accompli.*

22. The extent to which any particular witness has been subject to interference after rule adoption on 27 November 2013 is a factual question beyond the AUC's competence as *amicus curiae*. Thus, for our part, we urge only that this Chamber carefully consider the degree to which the stated disincentive announced at the 12th Session, namely the introduction of the prior recorded testimony, is applicable to any interference suffered by a specific witness.

IV. The ICC Statute anticipates changes to the law, but not at expense of the accused fundamental fair trial rights

23. In determining the possible applicability of new Rule 68 to this trial, which was underway for well over two months *before* the amendment, the AUC urges the Chamber to address the clear dictates of the ICC Statute regarding evolving law before the Court.

24. As a preliminary matter, the AUC notes that Article 21(1)(a) defines "Applicable Law" as "[i]n the first place this Statute, Elements of Crimes and its **Rules of Procedure and Evidence**" (emphasis added).

25. Article 24(2) refers back to this definition in providing that "[i]n the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply."[33]

[31] WGLL Proposal, para. 34.
[32] Contrast with the punitive, retributive and rehabilitative rationales, which suffer no such logical difficulty. Legality aside, these criminal law justifications can logically be applied to past conduct.
[33] *See also*, Bruce Broomhall, 'Article 51' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (2nd edn, Hart Publishing, 2008), p. 1045 fn 62 ("Of course, if article 24, para. 2 is read by the Court as including the Rules within the world 'law', then article 24 para. 2 will apply directly" to apply the law more favourable).

Nothing in this article suggests a more limited interpretation of the term "law applicable".[34]

26. The AUC submits that the thrust of these rules, when read together in their proper context, is that when considering which version of an amended rule to apply, the Trial Chamber is statutorily required to apply the law which is "more favourable to the person being investigated, prosecuted or convicted". Nothing in the articles at issue permits destruction of the shield that Article 24(2) erects to preserve the rights of an accused before the Court, nor for an exercise of discretion by the Trial Chamber. Article 21(1) clearly considers the RPE to be part of the "law applicable" and Article 24(2) requires application ("shall apply") of the law more favourable to the accused.

27. The Trial Chamber dismissed application of Article 24(2) to the RPE "as an initial matter" and cited only learned commentary in support of its problematic finding that "[t]he principle of non-retroactivity is more applicable to matters of substance than to those of procedure".[35] The Majority reasoned that application of Article 24(2) in this situation would render Article 51(4) redundant.

28. This reliance on the alleged substance vs. procedure distinction in respect of invocation of Article 24(2) was challenged in Presiding Judge Eboe-Osuji's partially concurring opinion.[36] In addition to finding support among "eminent jurists" whose views were more persuasive on the issue, he addressed the logical inconsistency of excluding the RPE from the ambit of Article 24(2) because they are purportedly "procedural law" instead of "substantive law."[37] The learned judge described his objections to this false dichotomy as mere "*obiter dictum.*" However, in our view, his approach to the question was both more substantial and more correct than the off-handed dismissal by the Majority. This analysis is trenchant despite the presiding judge's acceptance that application of the amended rule is not excluded by the rule against retroactivity. The AUC respectfully suggests that this Chamber consider adopting Judge

[34] The AUC also notes that the French and Spanish versions of the Statute uses identical terms between Articles 21 and 24 ("droit applicable" and "derecho aplicable" respectively).
[35] Impugned Decision, para. 22. *See also*, Black's Law Dictionary 580 (7th edn. 1999) (defining "ex post facto laws" to include "a law that changes the rules of evidence and receives less or different testimony than was required at the time of the commission of the offense in order to convict the offender").
[36] "Separate, Partly Concurring Opinion of Judge Eboe-Osuji on the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony", ICC-01/09-01/11-1938-Anx-Red, 19 August 2015 (hereinafter "Partially Concurring Opinion").
[37] Ibid., fn 2.

Eboe-Osuji's better view on the issue since it accords best with the letter and spirit of the ICC Statute vis-à-vis the Majority opinion.

29. Furthermore, the Trial Chamber's claim that the application of Article 24(2) to RPE amendments would makes Article 51(4) redundant disregards an essential facet of the Statute, namely that the Statute is not shy about reinforcing important principles. For instance, while the "rights of the accused" are enumerated in Article 67, several other articles reinforce the respect to be accorded to those fundamental rights. Articles 68(1), 68(2) and 68(5) provide that protections for witnesses and victims "shall not be prejudicial to or inconsistent with the rights of the accused." Article 69(2) similarly requires that introduction of evidence derived from witnesses "shall not be prejudicial to or inconsistent with the rights of the accused." Article 64 requires that the Trial Chamber ensure that proceedings are "conducted with full respect for the rights of the accused." If the Majority's rationale were correct, these specific invocations of the "rights of the accused" would function to nullify some aspects of Article 67. We submit that the repetition of a principle underscores its significance, rather than minimize or needlessly restrict it. Such is the case in respect of rights as fundamental as those to a fair trial, which is enshrined in Article 67, but also underscored by Articles 55, 66 and 70(7) of the ICC Statute.

30. The AUC further offers that Article 51(4) should be read as "a straightforward application to the Rules of the general principle of criminal law that is embodied elsewhere in the Statute."[38] To read the two Articles guaranteeing distinct rights, as the Majority has, ignores the clear inclusion of the RPE in the "applicable law" whose change triggers application Article 24(2). It also undermines the ICC statutory scheme under which the RPE can only be subordinate to the Statute, never the other way around.

31. Support for the proposition that Article 51(4) is a specific application of a general principle is found, *inter alia*, in the ICC Statute's drafting history. The retroactivity prohibition in Article 51(4) was not added to the draft statute until quite late in the drafting process. No direct corollary to this protection is found in either the Zutphen Draft,[39] or the 1998 Draft Statute.[40] Notably, the 1998 Draft was presented, without

[38] Broomhall, *supra* note 333, p. 1044.
[39] *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, U.N. Doc. A/AC.249/1998/L.13 (1998).

Article 51(4), on 14 April 1998. Thus, the addition of the paragraphs at issue here are not necessarily part of some foundational statutory scheme. Rather, they seem to have been added within the final months of the Statute's drafting as a clarifying mechanism.

V. Application of Amended Rule 68 would be retroactive

32. In deciding to accept the use of the challenged evidence, the Trial Chamber's Impugned Decision found as a matter of law that application of new Rule 68 was not retroactive, and thus that the protections afforded by Article 24(2) and/or Article 51(4) are inapplicable. The AUC respectfully urges this Chamber to reverse this mistaken impression of the law. The need for a correction should not be understated given all the implications of such an interpretation for other current ICC cases involving other African nationals outside of the Kenya Situation.

A. The Trial Chamber's application of Rule 68 to the present case is retroactive

33. Preliminarily, the Trial Chamber opined that "the Prosecution is seeking to apply the provision prospectively to introduce items into evidence for the truth of their contents" and not, for example, to "apply an amended admissibility provision to exclude evidence previously admitted into the record."[41] In so doing, the Trial Chamber ignored the substantial activity that preceded the Prosecution's request to admit the evidence.

34. Notably, the Prosecution's request is meant to remediate the presumed deficiency of *viva voce* testimony. The Prosecution's proffered means of remediation is the introduction of statements adopted by the witnesses during the OTP's investigation of the situation. These key events have already occurred. While it may be true that the Prosecution's *request* is prospective, this is merely a function of the linear nature of time and not the product of any legal doctrine.

35. The AUC submits that the present application of Rule 68 is clearly retroactive as it purports to address conduct that allegedly occurred prior to the rule's enactment. Notably, a finding by this Chamber in accord with this understanding of the Rule's application does not decide the matter at hand. Rather, as the Defence has recognized, because the Rule provides for the possibility of *neutral* or *beneficial retroactivity*,[42] "the

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[40] *Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2/Add.1 and Cor. 1 (1998).
[41] Impugned Decision, para. 23.
[42] Broomhall, *supra* note 33, p. 1044.

real inquiry lies in what is meant by the word 'detriment'".[43] Ultimately, a finding that the rule is, in fact, being applied retroactively only requires that the Chamber consider whether it is being done so to the detriment, prejudice or disadvantage of the accused.

36. Significantly, Trial Chamber III applied the unamended version of Rule 68 in *Prosecutor v. Jean-Pierre Bemba Gomba* nearly a year after the adoption of the amended rule and a year before issuance of the Impugned Decision.[44] In similar circumstances, the Prosecution sought to introduce prior testimony of witnesses, at least some of whom also testified orally before the Court. With regard to which version of Rule 68 applied to these submissions, Trial Chamber III noted "that Rule 68 was amended by Resolution ICC-ASP/12/Res.7 but that the amended rule cannot be applied retroactively to the detriment of the person who is being investigated or prosecuted. For present purposes therefore, the Chamber will apply the unamended Rule 68".[45]

37. Contrary to the bald assertion of Trial Chamber V(a) in the present case, this ruling is not *obiter dictum.*[46] Rather, the decision on which version of Rule 68 to apply was essential to Trial Chamber III's evidentiary ruling, and thus cannot be said to be a "judicial comment made while delivering a judicial opinion … that is unnecessary to the decision in the case and therefore not precedential."[47] The earlier holding of the equally competent Trial Chamber III, though not *per se* binding on another trial chamber or this appeals court, should be given proper and collegial consideration by the other members of the bench.

VI. Any such application of Rule 68 would be "detrimental" to the accused

38. The AUC submits that the introduction of the challenged evidence would clearly be detrimental to the accused, and commends the Defence treatment of the issue to the

[43] "Public redacted version of the 'Ruto Defence appeal against the Decision on Prosecution Request for Admission of Prior Recorded Testimony'", ICC-01/09-01/11-1981-Red, 6 October 2015, para. 27.
[44] "Public Redacted Version of 'Decision on the admission into evidence of items deferred in the Chamber's previous decisions, items related to the testimony of Witness CHM-01 and written statements of witnesses who provided testimony before the Chamber'", ICC-01/05-01/08-3019-Red, 26 August 2014.
[45] ICC-01/05-01/08-3019-Red, fn. 88, fn. 111.
[46] Impugned Decision, fn. 32.
[47] Black's Law Dictionary (10th edn 2014), p. 1240 (defining "obiter dictum").

Chamber.[48] A few additional points bear explication as they may be of further assistance to the resolution of the first issue certified for this appeal.

A. The uncertainty rationale offered by the Trial Chamber decision is overstated and erroneous

39. In the Impugned Decision, the Trial Chamber reasons that application of new Rule 68 in the abstract is appropriate because "[t]o do otherwise would create uncertainty and double standards across procedural amendments, potentially requiring oscillation between amended and unamended rules each time an application was filed."[49] The AUC respectfully submits that this concern is overstated and incorrect for at least four reasons.

40. First, the Trial Chamber considered that the ASP failed to provide an express time limit on the application of the new Rule 68 as evidence of its intention that the Rule should apply universally and immediately.[50] The AUC notes that such a limitation, endorsed by the Trial Chamber, would nonetheless require "oscillation between amended and unamended rules."[51] Specifically, applications filed before the expiration of the time limitation would require application of the unamended rule; applications filed after the expiration would permit application of the amended rule. In embracing the ASP's ability to require such oscillations, the Trial Chamber is also undermining its rationale.

41. Second, the alleged procedural difficulties encountered by a Trial Chamber considering a Rule 68 application do not trump the fair trial rights enshrined in the Rome Statute. Surely, the Statute is clear that accused before the Court are entitled to specific fair trial rights, and that such concerns are paramount in the exercise of the Court's jurisdiction. The implication that a Chamber considering Rule 68 applications would encounter some difficulty does not erase those protections.

42. Third, as the ASP noted, Rule 68 has been used sparingly before the Court.[52] As such, the likelihood that the Trial Chambers' collective energy will be consumed with procedural "oscillations" is slight. In any event, divorcing the rule into abstraction does nothing more than provide judicial cover for a later concrete application that affects the

[48] *See*, "Public redacted version of the 'Ruto Defence appeal against the Decision on Prosecution Request for Admission of Prior Recorded Testimony", ICC-01/09-01/11-1981-Red, 6 October 2015, paras. 31-42.
[49] Impugned Decision, para. 24.
[50] Impugned Decision, para. 17.
[51] Impugned Decision, para. 24.
[52] *See* WGLL Proposal, para. 6.

important rights of the accused enshrined in the Court's core constitutive document. It is precisely the procedural *coup de grâce* that substantive Article 24(2) of the Statute was meant to forestall.

43. Fourth, any concern over oscillating procedural requirements is strictly proscribed in time. To be sure, the understanding of Articles 24(2) and 51(4) urged here by, *inter alia*, the AUC would occasion some additional procedural considerations by the Trial Chambers currently hearing cases. However, this effect would not attach to future cases or situations. Proceedings on an indictment filed today would have no basis on which to apply the prior version of Rule 68. Any oscillation required of the Trial Chamber will be a fleeting concern as cases currently before the Court come to conclusion and new cases arise. Notably, this effect is unique to the ICC in international criminal law. As a permanent institution of indefinite tenure, the ICC is not subject to the same *ratione temporis* concerns that impacted the ICTs in the application of their RPEs.

44. With that in mind, the AUC respectfully urges this Chamber to consider the legal consequences of excluding amended Rule 68 from the application of Articles 24(2) and 51(4) without regard to any temporary inconvenience to the Trial Chambers charged with applying the Rules.

B. The Trial Chamber's equality of access argument is misplaced, and fails to account for the prosecutions' unique burden of proof

45. The Trial Chamber and the Prosecutor agree that new Rule 68 is neutral in application because it is available to both parties, and thus that its application is not detrimental to the accused.[53] The AUC respectfully submits that this understanding of the relative positions of the parties is misplaced.

46. At the risk of stating the obvious, the accused and the Prosecution do not occupy equivalent positions before the Court. The ICC Statute is explicit in the protections to be afforded to an accused[54] such that a person indicted by the Court is not subject to an arbitrary and oppressive exercise of power. The Prosecution is the vector by which such

[53] Impugned Decision, para. 25; Prosecution Request, paras. 31-32.
[54] *See*, Article 67, ICC Statute. *See also*, Article 68 (balancing the rights of victims and the accused); Article 69(2) (ensuring that the accused's rights are respected with regard to presentation of evidence); Rule 91(3)(b), Rule 101(2), Rule 134 *ter* (2)(d), Rule 134 *quater* (all explicitly requiring consideration of the "rights of the accused").

an exercise of power would be executed.[55] The core duties of the Prosecutor are explicitly outlined in the Statute;[56] no concomitant legal rights are afforded the Prosecutor.

47. Furthermore, the burden of proof beyond a reasonable doubt rests with the Prosecutor.[57] A defendant is not required to submit any evidence to the Court whatsoever, whereas the Prosecutor is obliged to submit evidence sufficient to erase doubt of innocence from a reasonable mind. The equality of access to rules admitting of evidence is a phantom; the evidentiary burden clearly remains with the Prosecution and any expansion of the ability to introduce evidence is *ipso facto* a benefit to the party legally required to present evidence and a detriment to the party against whom the evidence is to be introduced. That a defendant is able to avail himself of a procedural rule, should he so choose, does not serve as basis to reverse this sacrosanct burden.

C. Deferring to "interests of justice" is inappropriate and erroneous

48. The Trial Chamber has posited that the detriment to the accused may be considered as a part of the "interest of justice" prong of the Rule 68 analysis. In so doing, the Trial Chamber erred in at least two ways.[58]

49. First, assessment of the interests of justice is the height of a discretionary act. The Trial Chamber's construction thus creates a discretionary exercise out of a hard barrier. As discussed earlier, Article 24(2) and 51(4) do not permit discretion on the part of the Trial Chamber. They operate mechanically to require application of the "law more favourable" to the accused. As such, in assuring that proper considerations of justice will be dealt with in the interest of justice analysis, the Trial Chamber is assuming a discretionary mode where no such role seems authorized by the Statute.

50. Second, the "interest of justice" analysis is not a part of each of Rule 68's sub-rules. Notably, Rule 68(2)(c), through which the Trial Chamber admitted at least one witness' prior statements, does not include such an analysis. As such, deferring the considerations properly part of analysis of Articles 24(2) and 51(4) to the "interests of

[55] Of course, this is not to suggest that the Prosecution is exercising its power oppressively. Rather, any oppressive exercise of the Court's power, should it ever arise, would be routed through the Prosecution.
[56] *See* especially Articles 15, 53, 54, ICC Statute.
[57] Article 66, ICC Statute.
[58] Impugned Decision, paras. 56-60.

justice" analysis under the Rule will create a class of submissions to which no analysis of the accused's rights is conducted whatsoever. Evidently, such a pronounced diversion from the statutory guarantees would be accomplished by more than creative silence on the part of the ASP.

51. Finally, the Trial Chamber did, in fact, apparently find that the application of amended Rule 68 would be detrimental to the defendants. However, the Trial Chamber determined that it was not "unduly detrimental."[59] In so doing, the trial court showed the importance of applying the hard barrier contained in Articles 24(2) and 51(4), as well as the potential pitfalls of deferring the assessment of the statutorily guaranteed rights of the accused to a discretionary prong of a rule of evidence or to a later (final deliberations) stage of the trial process.

VII. That amended Rule 68 was not intended to apply retroactively to the prejudice of the accused is confirmed by the negotiations and declarations at the Twelfth Session of the ASP

52. Additionally, several States Parties have repeatedly expressed concern that application of amended Rule 68 to the present case would be in contravention of the understanding achieved during the negotiations at the Twelfth Session in at least two important ways.

53. First, a number of AU Member States have asserted that the Prosecutor or a court official affirmed that the amended Rule 68 would not apply to on-going proceedings.[60] Although it is up to this Chamber instead of the AUC to validate these claims to a legal certainty, it seems prudent to address the legal ramifications of such a commitment if the appropriate finder of fact determines that it was undertaken.

54. It is by now a universally accepted rule of international law that "declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations."[61] Indeed, according to the International Court of Justice ("ICJ"), the "binding character of an international obligation assumed by unilateral decision" is based on "the principle of good faith" such that States "are entitled to require that obligations [created by unilateral declaration] be respected."[62] Relatedly,

[59] Impugned Decision, paras. 60, 80.
[60] *See, e.g.*, the *amicus curiae* applications filed by Kenya, Uganda, and Kenya in the present case.
[61] *Nuclear Tests Case (Australia v. France)*, Judgement, I.C.J. Reports 1974, p. 267, para. 43.
[62] Ibid., para. 46.

such unilateral declarations cannot be revoked arbitrarily where the counterparty has relied on them.[63]

55. The ICJ has clarified that this ability to create obligations unilaterally on which counterparties are entitled to rely exists both in "Heads of States, Heads of Government and Ministers of Foreign Affairs"[64] and in "other persons representing a State in specific fields [who] may be authorized by that State to bind it by their statements in respect of matters falling within their purview."[65]

56. Of course, these seminal rulings were rendered in regard to the acts of States under the *Vienna Convention on the Law of Treaties* ("VCLT 1969"). However, parallel obligations and rights exist under the 1986 *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* ("VCLT 1986"). As in the VCLT 1969, Article 7 of the VCLT 1986 describes those persons who have "full powers" to conclude agreements on behalf of both a State and an international organization. Article 7(3) provides that a person may bind an international organization where "it appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization."[66] The AUC respectfully submits that this provision creates the same powers in a representative of an international organization, such as the Prosecutor, to bind her institution as was found to exist in agents of a State in the *Nuclear Test Cases* and *Congo v. Rwanda*, at least within the confines of their areas of competence.

57. Notably, as one of the recognized principal organs of the ICC under Article 34, the OTP already exercises powers on the international plane through bilateral agreements with States formalizing rights and obligations with respect to core functions.[67] As such, holding the Prosecutor to any unilateral commitments proven to have been made at the 12th Session is simply recognition of the OTP's international character with respect to

[63] "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto", International Law Commission, *Yearbook of the International Law Commission*, 2006, vol. II, Part Two, p. 380.
[64] Article 7(2), VCLT 1969.
[65] *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, I.C.J. Reports 2006, 3 February 2006, para. 47.
[66] Article 7(3), VCLT 1986.
[67] For instance, the Prosecutor has executed an Agreement on Judicial Cooperation with the Democratic Republic of the Congo, and an Agreement on Execution of Arrests Warrants with Sudan.

States, and not new law. It is also accords with the centrality of the Prosecutor as driver of the criminal justice processes before the Court.

58. A second related consideration is the fact that several African States Parties expressed their understanding of the amended Rule's non-retroactivity at the Plenary Session of the WGA without objection from other representatives.

59. Kenya stated, with respect to the non-retroactive application of Rule 68 that:

> as regards Rule 68, we welcome the assurances that precede the draft resolution and in particular the non-retroactivity of this Rule, in respect of the trials that may be ongoing, the rights of the suspects who may already be before the Court. ... But above all else, because this is a rule of practice, it is a rule of procedure, we would hope that it would be kept actively under review so that we are able to ensure that in trying to expedite trials we do not compromise the integrity of an international court because it should be of the highest standard that international jurists can accommodate.[68]

60. The representative of Nigeria echoed this understanding of the same rule:

> I take Rule 68 first and foremost. I have noticed that the provision will not be applied retroactively. This takes care of major concerns. My delegation is worried about the future application of this provision. But unfortunately this appears to be the best we can get presently. It is therefore the best step forward. My delegation therefore welcomes and supports it. [69]

61. South Africa also welcomed "the efforts made on Rule 68" and was "agreeable to moving forward on that."[70] None of the other States Parties present at the Plenary Session objected to or offered a contrary view to that publicly expressed by the these three major African States.

62. These public statements may properly be considered interpretative declarations[71] and not merely political pronouncements. Such declarations form part of the "context" which Article 31 of VCLT 1969 requires to be taken into consideration during interpretation of treaty provisions.[72] While one party to a negotiation may not unilaterally

[68]Transcription of audio recording of the Plenary (Formal) Session of the Working Group on Amendments, 27 November 2013, at 1345hrs.
[69] Ibid.
[70] Ibid.
[71] International Law Commission, UN Doc. A/CN.4/491 and Add.1-6, *Third report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur*, YBIL (1998) Vol. 2, Part 1,, para. 236 (noting the historical prevalence of statements that "do not … seek to modify or exclude the legal effect of certain provisions of the treaty and thus do not constitute reservations.").
[72] Ibid., para. 334.

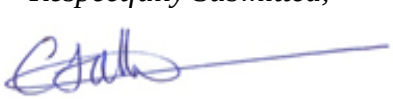
redefine the relevant provision, "[i]f the interpretation proposed by the declarant is accepted, expressly or implicitly, by the other contracting parties, the interpretative declaration constitutes an element of a subsequent agreement or practice."[73]

63. The AUC submits that there is ample evidence that the interpretations adopted by Kenya, Nigeria and South Africa were endorsed by other States Parties, at least implicitly. Representatives of these African States publicly declared their understanding of the consensus reached on the non-retroactive application of Rule 68. As such, this must be considered an "interpretative declaration constitut[ing] an element of [the] subsequent agreement."[74] Importantly, the statements by the AU States resonate with the views of the chairperson of the WGA who also assured the plenary that Rule 68 will not apply retroactively to disadvantage the accused. These declarations are helpful to properly appreciate the ASP Resolution's singular emphasis on Article 51(4). It may also be that, after appropriate factual inquiry, the Prosecutor or a Court official might be found to have given undertakings to States that explicitly validated their understanding of the amendments. If this is the case, it would undermine the claim that only the text of amended Rule 68 should be considered in determining its proper application,[75] both as a validation of their interpretative declarations and as a matter of unilateral commitment.

VIII. Conclusion

64. For the above reasons, the AUC respectfully invites this Chamber to rule that the Impugned Decision's application of amended Rule 68 to the present case would be retroactive, detrimental to the accused and in contravention of the ICC Statute as well as the legitimate expectations of African States Parties in the 12th ASP Session. We hope that these observations will be of some assistance in resolving this appeal.

Respectfully Submitted,



Prof. Charles Chernor Jalloh
On behalf of the African Union Commission

Dated this 19th day of October 2015.
At Miami, United States of America.

[73] Ibid., para. 330.
[74] Ibid.
[75] Prosecution Request, paras. 14, 17.