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No.: **ICC-01/09-01/11**
Date: **6 October 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

Public redacted version of the "Ruto Defence appeal against the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'", 5 October 2015, ICC-01/09-01/11-1981-Conf

Source: **Defence for Mr. William Samoei Ruto**

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INTRODUCTION

1. On 19 August 2015, a Majority of Trial Chamber V(A) ("Majority"), Judge Eboe-Osuji partly concurring,[1] issued the *Decision on Prosecution Request for Admission of Prior Recorded Testimony* ("Decision"),[2] whereby the hearsay evidence of [REDACTED] Prosecution "linkage"[3] witnesses ("Rule 68 Witnesses"), stated to be "necessary to [the Prosecution] to prove its case"[4] was admitted under amended Rule 68 of the Rules of Procedure and Evidence ("Rules") for the truth of its contents.

2. This hearsay evidence was admitted despite it being unsworn, disavowed by [REDACTED] witnesses and untested in respect of the [REDACTED], largely uncorroborated, mutually inconsistent and contradicted by other trial evidence, including independent media reports. It is also the product of Prosecution interviews which: (i) were neither audio nor video recorded; (ii) permitted one witness to consult [REDACTED] during the interview, which the interviewers did not [REDACTED]; (iii) were conducted without the needed assistance of an interpreter in respect of two witnesses; and (iv) did not produce *verbatim* transcripts but summaries prepared by the Prosecution, rather than an independent third party.

3. The Decision is the first judicial consideration of the interpretation and application of amended Rule 68. In this Decision, the defence for Mr. William Samoei Ruto ("Defence") submits that the Majority made at least the seven errors for which leave to appeal was granted.[5] These errors are fundamental in nature and, individually and/or cumulatively, materially affect the Decision. Leave to appeal was granted on the following seven grounds:

[1] ICC-01/09-01/11-1938-Conf-Anx; ICC-01/09-01/11-1938-Anx-Red ("**Partly Concurring Opinion**").
[2] ICC-01/09-01/11-1938-Conf; ICC-01/09-01/11-1938-Red-Corr.
[3] ICC-01/09-01/11-1866-Conf ("**Application**"), paras. 131, 147, 165, 179, 215.
[4] Application, para. 52.
[5] *See* Decision on the Defence's Applications for Leave to Appeal the "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 10 September 2015, ICC-01/09-01/11-1953-Conf-Corr, para. 20 and p. 14 granting the Defence's request for leave to appeal the Decision in respect of seven identified issues.

First Ground of Appeal: The Majority erred by finding that amended Rule 68 of the Rules can be applied in this case without offending Articles 24(2) and 51(4) of the Rome Statute ("Statute").

Second Ground of Appeal: The Majority erred by determining that written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can qualify as 'prior recorded testimony' for the purpose of Rule 68(2)(c) and (d) and, thus, may be admitted for the truth of their contents.

Third Ground of Appeal: The Majority erred in its assessment of the concept of 'failure to give evidence with respect to a material aspect' pursuant to Rule 68(2)(d)(i) of the Rules.

Fourth Ground of Appeal: The Majority failed to apply the appropriate standard of proof when evaluating whether the conditions under Rule 68(2)(c) and (d) of the Rules were met, including, in particular, in its assessment of the existence of 'interference'.

Fifth Ground of Appeal: The Majority erred in its interpretation and/or application of the concepts of 'indicia of reliability' and 'acts and conduct of the accused' pursuant to Rule 68(2)(c) and (d) of the Rules.

Sixth Ground of Appeal: The Majority erred in its consideration of 'interests of justice' pursuant to Rule 68(2)(d) of the Rules.

Seventh Ground of Appeal: The Majority erred by finding that written statements and transcripts of interviews taken in accordance with Rules 111 and 112 of the Rules can be admitted in their entirety for the purpose of Rule 68 (2)(c) and (d).[6]

STANDARD OF REVIEW

4. This Chamber has held that "[o]n questions of law, [it] will not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision."[7]

[6] This ground was the third issue certified for appeal but has been re-ordered to be the final ground of appeal because it does not challenge the admission of the statements but the extent of their admission.
[7] ICC-02/05-03/09-295 OA 2, para. 20.

5. In relation to errors of fact, "[t]he Appeals Chamber will not interfere with the factual findings of a first instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into account relevant facts…[The Appeals Chamber] will interfere only where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it."[8]

6. This Chamber has also recently reaffirmed that it "may…interfere with a discretionary decision where it amounts to an abuse of discretion" and "an abuse of discretion will occur when the decision is so unfair or unreasonable as to 'force the conclusion that the Chamber failed to exercise its discretion judiciously'".[9] In addition, "[t]he Appeals Chamber will…consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations in exercising its discretion."[10]

[8] ICC-01/09-02/11-1032, para. 24 (footnotes omitted).
[9] ICC-01/09-02/11-1032, para. 25 (footnotes omitted).
[10] ICC-01/09-02/11-1032, para. 25 (footnotes omitted).

GROUNDS OF APPEAL

I. First Ground: Errors in Relation to the Application of Articles 24(2) and 51(4) of the Statute

7. The Majority erred by finding that amended Rule 68 of the Rules can be applied in this case without offending Articles 24(2) and 51(4) of the Statute.[11]

A. Article 24(2)

8. In determining that amended Rule 68 does not fall under Article 24(2) of the Statute, the Majority's error was two-fold.[12]

9. In the first place, the Majority erred by finding that Article 24(2) is limited to changes in substantive law.[13] The Defence submits that the correct position, and one which has scholarly support, is that this Article is a statement of general principle regarding non-retroactivity in criminal law which relates, not only to crimes and penalties, but also to changes in procedural law (including that governing the admission of evidence).[14]

10. The Majority's flawed approach to Article 24(2) is the first of several instances in the Decision where it fails to interpret a provision in accordance with its ordinary meaning. As observed in the Partly Concurring Opinion, "[i]t is a cardinal rule of treaty interpretation that terms are to be given their 'ordinary meaning' in their context and in light of the object and purpose of the treaty."[15]

[11] Decision, paras. 22-27.
[12] Decision, para. 22.
[13] Decision, para. 22.
[14] *See*: (i) Lind, C., comment on Article 24(2) in the ICC Commentary on the Case Matrix Network (http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/); (ii) Boot, M., Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court (Intersentia, 2002), p. 374; (iii) Broomhall, B., "Article 51 Rules of Procedure and Evidence", in Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (Hart 2008), fn. 61.
[15] Partly Concurring Opinion, para. 19 citing to Article 31(1) of the Vienna Convention on the Law of Treaties 1969 ("**VCLT**").

11. Interpreting the terms of this Article in accordance with their ordinary meaning establishes that the Rules – and more generally the procedural law applicable in a case - are included within the word "law" for the purposes of Article 24(2).[16] Article 24(2) provides that: "In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply". Express reference is made in the Article to changes in "the law applicable" which can only mean "the applicable law". Article 21 (Applicable law) of the Statute reads in part that: "(1) the Court shall apply: (a) In the first place, this Statute…and its Rules of Procedure and Evidence".

12. While the Majority failed to give the terms of Article 24(2) their ordinary meaning, it did consider the provision in context. However, the Majority erred by concluding that Article 24(2) "forms part of the three provisions that together set out the principle of legality applicable before the Court" and "[r]ead together, it is clear that these provisions pertain to the substantive law".[17] The conclusion that the principle of legality is restricted to substantive law is incorrect, unsupported and contradicted by the Majority's own concession that the principle of non-retroactivity can also "generally apply to the Rules".[18] Indeed, Article 51(4) is a clear recognition that the principle of legality is not restricted to substantive law.

13. In its limited contextual analysis, the Majority failed to acknowledge that, unlike Articles 22 and 23, Article 24 plays a unique and novel role in the ICC legal framework because it "does not have any predecessor in international human rights documents".[19] In this regard, it is wider in scope than analogous provisions in other human rights instruments such as Article 15(1) of the

[16] Broomhall, B., *supra*, fn.61; Lind, C., *supra*.
[17] Decision, para. 22.
[18] Decision, para. 22.
[19] Lind, C., *supra*.

International Covenant on Civil and Political Rights.[20] One commentator has observed that Article 24(2) is equivalent to the domestic law rule against *ex post facto* laws, the definition of which includes changes to the rules of evidence and is in relevant part as follows:

> *"[…] 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; […] every law which in relation to the offense or its consequences, alters the situation of a person to his disadvantage".*[21]

14. Applying this definition to the present situation, it is clear that the rules of evidence have been changed in the course of Mr. Ruto's trial to permit the admission of "less or different testimony" which the prosecution contends is central to its bid to convict Mr. Ruto of the offences charged.

15. The flaw in the Majority's reasoning that Article 24(2) is limited to substantive law is further underlined in the Partly Concurring Opinion. As Judge Eboe-Osuji noted,

> *"article 51(4) says nothing about amendments to other regulatory instruments of the Court which in their own terms can very well operate in a manner that can have a detrimental effect on the rights of the accused. This means that the mechanical exclusion of article 24(2) from any influence in the realms of 'procedural law', may leave changes in much of the Court's procedural instruments (other than the Rules […]) statutorily unregulated".*[22]

16. Judge Eboe-Osuji also noted that "the 'substantive law' versus 'procedural law' dichotomy" is unsustainable, particularly when the Regulations of the Court deal with matters which may have substantive impact on the rights of the accused.[23]

17. On this basis, the Majority was wrong to conclude that Article 24(2) is limited to

[20] Article 15(1) provides in relevant part "[i]f, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."
[21] Pangalangan, R., "Article 24 Non-retroactivity *ratione personae*", in Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (Hart 2008), p.740 citing to Black's Law Dictionary 580 (7th ed. 1999).
[22] Partly Concurring Opinion, fn. 2.
[23] Partly Concurring Opinion, fn. 2.

substantive law. Rather, applying its plain terms and recognising its unique and novel role in completing the articulation of the principle of legality in this Court's legal framework, establishes that Rule 68 does fall within the scope of Article 24(2).

18. The Majority's second error concerns the finding that, "if Article 24(2) governed all amendments to the Rules…, then Article 51(4) would be rendered almost entirely redundant".[24] The reasoning of the Majority is predicated on the assumption that the same value, right or principle cannot simultaneously exist in two separate articles of the Statute. This error led the Majority to find that Article 24(2) was inapplicable. The assumption underlying the Majority's reasoning is erroneous.

19. The fact that separate Articles of the Statute make reference to the same value, right or principle does not render one Article automatically redundant in relation to the other. For example, the principles contained in Articles 22(1) and 24(2) overlap to a certain degree. The *nullum crimen* principle detailed in Article 22(1) does not, *ipso facto*, render non-applicable or redundant the principle of non-retroactivity detailed in Article 24(2). Both Articles seek to guarantee important rights and values as general principles of criminal law. They should be read as free standing Articles that are independent but complementary to each other.[25] The obligation to read the Statute harmoniously and effectively has been demonstrated by the Appeals Chamber previously. For example, it has found that part of the rationale for including Article 63(1) of the Statute was to reinforce the right of the accused to be present at his or her trial and, in particular, to preclude any interpretation of Article 67(1)(d) of the Statute that would allow for a finding that the accused had implicitly waived his or her right to be present by

[24] Decision, para. 22.
[25] Such an interpretation is in accordance with the principle of "'effective interpretation' (also known as the '*effet utile*' or *ut res magis valeat quam pereat*), [which] favours a construction that gives genuine effect to a provision over one that does not." *See* Schabas, W, "Interpreting the Statutes of the *Ad Hoc* Tribunals" in War Crimes and Human Rights: Essays on the Death Penalty, Justice and Accountability (Cameron May 2008), p. 439. *See also Prosecutor v. Tadić*, IT-94-1, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 2005, Section IV.

absconding or failing to appear for trial.[26] The Majority erred in not interpreting Articles 24(2) and 51(4) in a harmonious manner. Instead, it simply ruled inapplicable an important general principle of criminal law that was of central importance in determining the application before it.

20. It is additionally pertinent to note that, in reaching its erroneous conclusion, the Majority failed to consider the fact that Articles 24 and 51 are in different parts of the Statute and to assess what, if any, significance this had to the role, purpose and application of these two Articles.[27] Article 24 is, of course, included in Part 3 of the Statute and, constitutes a general – and unqualified – "General Principle of Criminal Law". In contrast, Article 51 falls within Part 4 of the Statute which deals with the "Composition and Administration of the Court".

21. Properly considered, Article 51(4) should be read as reinforcing the importance of the principle of "non-retroactivity", a principle which finds its full expression in various provisions including Article 24(2) in Part 3 of the Statute.[28] Notwithstanding the foregoing, Article 51 retains its primary function which is to set out the procedure for making rule changes, with sub-Rule 51(4) reiterating a general principle of criminal law which is also to apply to provisional Rules.

22. Had Article 24(2) been properly applied in this case, it would have prohibited the application of amended Rule 68 in this on-going trial where such application is less favourable to the accused. The terms of the previous Rule 68 (which applied at the start of trial) were more favourable because the bases on which prior recorded testimony could be admitted against the accused for the truth of its

[26] ICC-01/09-01/11-1066, para. 54.
[27] It is well recognised that headings may be used as an internal aid to construing a statute. *See*, *e.g.*, *Buckie Magistrates v. Countess of Seafield's Trustees* 1928 SC 525 at 528-529 *per* Lord President Clyde, "in construing a statutory enactment — assuming that there is anything in it which fairly raises a question of doubtful construction — the enactment must be interpreted in the light of the context in which it is found; and that, if the Act in which the enactment occurs is divided into parts or compartments with separate headings, the particular enactment under construction must be considered in the light thrown upon it by the description of the heading under which it is placed."
[28] Broomhall, B., *supra*, p. 1044 ("The prohibition on retroactive application of an amended or provisional rule to the detriment of a person who is being investigated or prosecuted or who has been convicted is a straightforward application to the Rules of the general principle of criminal law (both national and international) which is embodied elsewhere in the Statute").

contents were more limited and would not have permitted the admission of the Rule 68 Witnesses' prior statements in the present circumstances.

B. Article 51(4)

23. At the outset, the Defence acknowledges that, on the plain wording of Article 51(4), in order for the prohibition to apply, the application of amended Rule 68 must be both retroactive and "to the detriment of the person who is being…prosecuted". The Majority erred by finding that neither condition is met.[29]

24. In relation to the amended Rule's retroactive application, the Majority erroneously concluded that it "does not consider the relief sought to be a retroactive application" because "[t]he Prosecution's Request is not seeking to alter anything which the Defence has previously been granted or been entitled to as a matter of right."[30] This conclusion is flawed for at least four reasons.

25. *First*, in determining whether amended Rule 68 was being applied "retroactively", the Majority erred by considering the issue generally and without specific reference to the rules of statutory interpretation which apply when there is a change in the law during the course of on-going proceedings. The presumption is that a case will proceed on the basis of the law which applied when the case started. A change in the law which takes effect during the course of pending proceedings will only apply to those proceedings provided it does not offend the presumption against the retroactive application of legislation.[31]

26. When considering the presumption against retroactivity a distinction is drawn

[29] Decision, paras. 23-27.
[30] Decision, para. 23.
[31] The Defence notes that the approach taken at the ICTY and the ICTR is that changes in the law which occur during on-going proceedings are considered to be the potential application of retroactive legislation which then trigger consideration of ICTY Rule 6(D) or ICTR Rule 6(C). *See, e.g., Prosecutor v. Šešelj*, IT-03-67-T, Redacted version of the "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 7 January 2008, 21 February 2008, paras. 33-34; *Prosecutor v. Nyiramasuhuko et al*, ICTR-98-42-T, Decision in the Matter of Proceedings under Rule 15*bis*(D), 15 July 2003.

between "enactments which create, modify or abolish substantive rights or liabilities" and "enactments which deal *purely* with practice and procedure before the courts."[32] In relation to substantive rights, "[i]n the absence of a clear indication of a contrary intention in an amending enactment, [such] rights of the parties to an action…fall to be determined by the law as it existed when the action was commenced".[33] But "[t]he general presumption against retrospection does not apply to legislation concerned merely with matters of procedure".[34] Instead, "[p]rocedural enactments affect proceedings pending at their commencement unless the contrary intention appears".[35] Therefore, the intention of the legislature is central to the issue as to whether an amended Rule is to have effect in pending proceedings.

27. At this Court, the intention of the legislature is expressly stated in Article 51(4). Amendments to the Rules – whether substantive or procedural – will not be applied retroactively to a person's "detriment" in, *inter alia*, on-going proceedings. This means that "*neutral* or *beneficial* retroactivity will sometimes be possible."[36] Accordingly, in the context of this on-going case, the real inquiry lies in what is meant by the word "detriment" (see below).

28. *Second*, the prohibition against the retroactive application of laws forms part of the rule against *ex post facto* laws.[37] As discussed in paragraphs 13 and 14 above, the present situation falls within the definition of *ex post facto* law.

29. *Third*, the Majority's approach to retroactivity is flawed because it fails to take

[32] *Nyiramasuhuko*, *supra*, para. 19 (emphasis in original).
[33] 44(1) Halsbury's Laws of England (4th ed) (Reissue), para. 1283 (footnotes omitted). *See also Nyiramasuhuko*, *supra*, para. 19.
[34] 44(1) Halsbury's Laws of England, *supra*, para. 1287 (footnotes omitted). *See also Nyiramasuhuko*, *supra*, paras. 19, 20.
[35] 44(1) Halsbury's Laws of England, *supra*, para. 1287 (footnotes omitted).
[36] Broomhall, B., *supra*, p. 1044 (emphasis in original). *See also* (i) *Nyiramasuhuko*, *supra*, para. 21 recognising that "the presumption against retrospective application of new law is a rebuttable one"; and (ii) *Prosecutor v. Milutinović et al.,* IT-05-87-T, Decision on Second Prosecution Motion for Admission of Evidence pursuant to Rule *92quater*, 5 March 2007, para. 8 where the Chamber considered Rule 6(D) but could not identify any way in which admitting the evidence would unduly prejudice the rights of the accused, underlining that neutral retroactivity was engaged.
[37] Pangalangan, R., *supra*, p. 736, para. 2.

into account that the facts and issues underlying the Application are not new and pre-date the rule change. All the materials admitted pursuant to the Decision, were produced prior to the adoption of amended Rule 68 on 27 November 2013.[38] Further, all alleged acts of interference, save in respect of [REDACTED], also allegedly took place prior to 27 November 2013.[39]

30. *Fourth*, even if the Majority's approach is found to be correct, the Majority erred by failing to properly apply it. In the Decision, the Majority fails to acknowledge that, according to the law which applied at the start of the case, Mr. Ruto's fair trial right to confront was guaranteed.[40] Prior to the Rule change, recourse could not be made to either Rule 68(a) or (b) in circumstances where an accused had not had an opportunity to confront the witness. Nor were the statements admissible under any other provision.[41] Therefore, applying the Majority's own reasoning, the amendments made to Rule 68 have fundamentally altered a right to which Mr. Ruto was entitled at the start of the case. This is because the prior statements and related material of [REDACTED] have been admitted under Rule 68(2)(c) despite the fact that Mr. Ruto did not have the opportunity to confront and question this witness at *any* stage of proceedings. Therefore, there has been a retroactive application of amended Rule 68 in respect of the admission of [REDACTED] unsworn, untested, hearsay evidence, to the obvious detriment of Mr. Ruto.

31. Turning to the second limb of Article 51(4), "detriment", the Majority erred by finding that "amended Rule 68 should be read on its face alone", "in the abstract, and not at any concrete application of it."[42] In the first place, the justification advanced by the Majority for this approach – the creation of "uncertainty and double standards across procedural amendments, potentially requiring oscillation between amended and unamended rules each time an application was

[38] Resolution ICC-ASP/12/Res.7.
[39] *See* ICC-01/09-01/11-1911-Conf-AnxC.
[40] *See* Statute, Article 67(1)(e) which enshrines the right to confront.
[41] *See*, *e.g.*, ICC-01/09-01/11-1353, paras. 85, 86, 88; ICC-01/09-01/11-1804, para. 27.
[42] Decision, para. 24.

filed" – does not withstand scrutiny.[43] Since the Statue came into force, there have only been six amendments to the Rules.[44] Therefore, in the life of a case or investigation, it is unlikely that the difficulties identified by the Majority will arise. Even if such difficulties were to be encountered, it is submitted that they are superseded by the interests of justice and the fair trial rights of an accused which dictate that a case-by-case analysis of detriment should be undertaken in order to give effect to the plain terms of the provision. Further, the ICTY's practice, which the Majority finds to be "persuasive authority in analysing the amended Rule 68 under Article 51(4) of the Statute",[45] does consider the application of amended legal provisions concretely and not simply in the abstract.[46]

32. In addition, the Majority's conclusion that the "application [of amended Rule 68] is not inherently detrimental to the accused" based on its abstract consideration of the Rule is flawed.[47] This conclusion rests solely on the fact that the rule is available to both parties. Even at the abstract level, this is no answer to the issue of whether the application of the amended Rule will be to an accused's detriment because it improperly equates the Defence with the Prosecution. Fundamental differences exist between the parties including that the burden of proof lies on the Prosecution and the Defence has the right to remain silent and, thus, may choose not to lead any evidence. Further, and considering the issue more concretely as, it is submitted, the Article requires, the plain wording of Article 51(4) only requires detriment to be assessed by reference to an accused, not the Prosecution. Put another way, in order for Article 51(4) to apply it simply requires to be shown that the amended rule will operate "to the detriment of the person who is being…prosecuted". As set out below, it will so operate. The

[43] Decision, para. 24.
[44] The amendments were to Rules 4, 4*bis*, 68, 100, 132*bis*, 134*bis/ter/quater*. The amendments to the Rules are reflected via footnotes in the Rules.
[45] Decision, para. 26.
[46] *See*, *e.g.*, *Šešelj, supra*.
[47] Decision, para. 25.

Defence's possible future use of the amended Rule will not ameliorate the detriment already suffered.

33. The Majority's reliance on *Šešelj* to support its conclusion is misplaced.[48] In *Šešelj*, the relevant "rules were introduced into the [ICTY] Rules more than a year *before* the trial…began".[49] It appears to have been the advance notice "of the Prosecution making use of these new procedures" in combination with the equal availability of the rule that permitted the Chamber to conclude that no prejudice had been shown.[50] In contrast, in this case, the amended Rule was adopted *after* the start of trial. This ICTY case, of persuasive value only, is, therefore, distinguishable. It should not have been followed in the present, inapposite, case.

34. Performing a case-by-case assessment of detriment when considering the "interests of justice" limb under Rule 68(2)(d)(i) does not correct the Majority's error for a number of reasons.[51] Crucially and most obviously, the Majority relegates "detriment" to form part of a discretionary test. The Majority fell into error in so doing. According to the plain wording of Article 51(4), for an amended rule to fall foul of the prohibition against retroactive application, all that requires to be shown is detriment. The analysis ends there. No discretion is involved. The flaw in the Majority's approach is further underlined by the fact that it *did* find "detriment" when assessing whether it was in the interests of justice to admit the material under consideration, albeit that it found that admission would not be "unduly detrimental".[52] However, this finding of "detriment", whether undue or not, means the application of the amended Rule in this case contravenes Article 51(4).

35. The corollary of deferring the assessment of "detriment" to the "interests of justice" limb was that the Majority never considered the detrimental effect

[48] Decision, para. 26. *Šešelji* is the only relevant authority referred to on this point.
[49] *Šešelj, supra*, para. 35 (emphasis added).
[50] *Šešelj, supra*, paras. 35-37.
[51] Decision, para. 27.
[52] Decision, paras. 60, 81, 111, 128.

caused by the admission of [REDACTED] prior statements. [REDACTED] prior statements were admitted under Rule 68(2)(c) but, unlike Rule 68(2)(d), this sub-Rule has no separate "interests of justice" limb.

36. In order to give proper effect to the protection contained in Article 51(4), a case-by-case assessment should have been undertaken when considering whether the amended Rule breaches Article 51(4) rather than deferred until the "interests of justice" limb of the Rule 68(2)(d)(i) test. Had this been undertaken, the conclusion which would have been reached is that the application of amended Rule 68 will operate to Mr. Ruto's detriment.

37. The Defence submits that "detriment" should be interpreted in accordance with its ordinary meaning. The *Shorter Oxford English Dictionary* defines "detriment" as "loss sustained by or damage done to a person or thing; a cause of loss or damage".[53] The *Collins Dictionary* provides a similar definition - "(1) disadvantage or damage; harm; loss. (2) a cause of disadvantage or damage".[54] Further assistance is provided by considering the synonyms of "detriment" which include "damaging, injurious, hurtful, inimical, deleterious, destructive, ruinous, disastrous, bad, malign, adverse, undesirable, unfavourable, unfortunate, unhealthy, unwholesome".[55] Based on the foregoing, the Defence submits that any amendment which alters the situation of a person in an on-going case to his disadvantage, damage or harm will breach Article 51(4).

38. The application of amended Rule 68 in this case will operate to Mr. Ruto's detriment. The effect of the rule change in the present case is to render admissible a body of incriminatory "linkage" evidence which would not have been admissible in the form in which it has now been admitted when the trial against him started. This change clearly harms, damages and/or places at a disadvantage Mr. Ruto as compared the position he faced – and protections he

[53] Oxford University Press, 5th ed. (2002), p. 660.
[54] 9th ed. (2007), p. 453.
[55] *Oxford*, *Dictionary*, *Thesaurus and Wordpower Guide*, 1st ed. (2001), p. 334.

was entitled to – when the trial against him commenced. Specifically, the amended rule permits not only the admission of an untested, unsworn, hearsay statement going to the acts and conduct of the accused for the truth of its contents, but also the admission of such a statement for truth in circumstances where a witness under oath has recanted from said statement.[56] Under the previous regime, the admission of such testimony in such circumstances was not permitted, hence the States Parties' decision to amend Rule 68.[57]

39. The hearsay nature of the evidence at issue also establishes detriment, particularly in the context of a criminal trial where the stakes for an accused could not be higher. Hearsay evidence "is necessarily second-hand and for that reason very often is second best. Because it is second-hand, it is that much more difficult to test and assess."[58] Further, the detriment or disadvantage to Mr. Ruto in this case is particularly acute because the amended rule is being used to seek the admission of evidence said to be central to the case against him.[59]

40. The broad interpretation accorded to "detriment" stands in contrast to the narrow approach taken to the interpretation of the ICTY's Rule 6(D). However, this narrow approach, whereby prejudice[60] to a right to which an accused has a legal entitlement must be shown, is explained by the difference in wording between the two provisions.[61] Rule 6(D) explicitly refers to "the rights of the accused" whereas Article 51(4) does not limit its application to "rights" but refers to the broader phraseology, "the detriment of the person".

[56] Rules 68(2)(c) and 68(2)(d).
[57] The limited application of the original rule is underlined by the reasons given by the Study Group on Governance for the amendments to Rule 68. *See* Study Group on Governance, Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, ICC-ASP/12/37/Add.1, 31 October 2013 ("**WGLL Report**"), Annex II.A, para. 3. *See also*: ICC-01/09-01/11-1353, paras. 85-88; ICC-01/09-01/11-1804, para. 27; and ICC-01/04-01/07-2635, para. 50 .
[58] *R v. Riat (Jaspal)*, [2013] 1 WLR 2592 *per* Lord Justice Hughes at 2597.
[59] Application, para. 52.
[60] The fact that the ICTY Rule refers to "prejudice" is of no significance because of its similar meaning to "detriment". *See* (i) *Oxford*, *Dictionary*, *Thesaurus and Wordpower Guide*, *supra*, p. 1008, "**prejudice**…be detrimental to"; and (ii) *Collins Dictionary*, *supra*, p. 1280, which defines "in (or to) the prejudice of" as "to the detriment of".
[61] *E.g., Prosecutor v. Mejakić et al*, IT-02-65-AR11*bis*.1, Decision on Joint Defence Appeal against Decision on Referral under Rule 11*bis*, 7 April 2006, paras. 85-87.

41. That said, even if, *arguendo*, the Chamber determines that this narrow approach applies to Article 51(4), Mr. Ruto's fair trial right to confront [REDACTED] has been detrimentally affected by the rule change because an unsworn, hearsay statement of an absent witness which goes directly to the acts and conduct of the accused has now been admitted for the truth of its contents, even though the Defence has not had the opportunity to cross-examine that witness.[62] This was not permitted under previous Rule 68(a), where a condition of admission was that the non-tendering party has had the opportunity to examine the now absent witness during the recording of the testimony, nor would it have been permitted under any other statutory provision according to this Chamber's jurisprudence.[63]

42. The above establishes that the Majority erred by finding that amended Rule 68 can be applied in this case without offending Articles 24(2) and/or 51(4) of the Statute. Had it not erred, the prior statements and related material of the Rule 68 Witnesses would not have been admitted. This First Ground of Appeal should, therefore, be granted.

[62] Statute, Article 67(1)(e). *See also* ICC-01/09-01/11-1353, para. 25 regarding the accused's interest in confronting a witness whose testimony implicates an accused in criminal conduct.
[63] *Supra*, fn. 41.

II. Second Ground: Error in relation to the Interpretation of "Prior Recorded Testimony"[64]

43. By finding that "prior recorded testimony" under amended Rule 68 extends to written statements taken pursuant to Rule 111 of the Rules,[65] the Majority erred by again failing to interpret a term in accordance with its "ordinary meaning".[66]

44. Contrary to the Majority's finding, defining "prior recorded testimony" to extend to unsworn written statements prepared by the Prosecution is not consistent with the language of amended Rule 68.[67] The term "testimony" is almost universally defined by reference to the presence of an oath or affirmation, something which is clearly absent from the materials admitted under the Decision.[68] Some examples of definitions are instructive. *Black's Law Dictionary* defines "testimony" as: (i) "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition";[69] and (ii) "written testimony" as "[i]n some administrative agencies and courts, direct narrative testimony that is reduced to writing, to which the witness swears at a hearing or trial before cross-examination takes place in the traditional way".[70] Similarly, the *Shorter Oxford English Dictionary* defines the term as "evidence given in court, an oral or written statement under oath or affirmation".[71] Finally, the definition given in the *Collins Dictionary* is "evidence given by a witness, esp[ecially] orally in court under oath or affirmation".[72] Based on these definitions, none of the materials admitted under the Decision fall within the ordinary meaning of "testimony".

45. While previous decisions of other Trial Chambers at this Court determining that written statements are "prior recorded testimony" for the purposes of Rule 68 are

[64] The Defence observes that whether or not the Prosecution's written statements and transcripts are testimonial in nature is a separate and distinct question which is not covered by this ground of appeal.
[65] Decision, para. 33.
[66] VCLT, Article 31(1). *See also* Partly Concurring Opinion, para. 19.
[67] Decision, para. 32.
[68] *See* Partly Concurring Opinion, paras. 23-25 as to why the "Witness Acknowledgment" appended to Prosecution witness statements does not remedy the absence of an oath or affirmation.
[69] West (9th ed.), p. 1613.
[70] West (9th ed.), p. 1614.
[71] Oxford University Press, 5th ed. (2002), p. 3223.
[72] 9th ed. (2007), p. 1666.

non-binding,[73] an additional basis on which these decisions should not be followed is because they are incorrect.[74] Those Trial Chambers made the same error as the Majority and failed to interpret "testimony" in accordance with its ordinary meaning.[75] The decisions relied upon by the Majority were not dispositive.[76] Indeed, they were erroneous.

46. The Majority also fell into error by relying on the WGLL Report.[77] The statement in the report that "Rule 68 may…apply to written statements taken by the parties" is based on the "prevailing jurisprudence" and made in the context of providing an explanation of the terminology used in the report.[78] No further import or meaning can be taken from it. This is underlined by the report's acknowledgement that the inclusion of prior written witness statements within the ambit of Rule 68 "is not necessarily universally accepted".[79] However, there is no evidence that, other than reproducing the definition found in the prevailing, non-binding jurisprudence, the Working Group on Lessons Learnt took any discernible view on the definition to be given to "prior recorded testimony" nor that it tried to address the perceived divergence in the prevailing jurisprudence. No such discussion took place at the ASP itself. Therefore, the inference drawn by the Majority that "neither the WGLL nor the ASP made any effort to qualify 'prior recorded testimony' when amending Rule 68 demonstrates an intention, or at least an openness, for amended Rule 68 to continue to apply to recorded statements under Rules 111 and 112" does not withstand proper scrutiny.[80] There is no evidence that the focus of discussions in the WGLL and/or at the ASP was on what the legal definition of "testimony" should be. Instead, the focus was on the contended expediency and efficiency that would be effected by the proposed

[73] Statute, Article 21(2).
[74] *See* the decisions listed in Decision, fn. 40.
[75] *E.g.*, ICC-01/04-01/06-1603, para. 18 ("the Chamber is persuaded that the ambit of Rule 68 permits the introduction of written statements, in addition to video- or audio-taped records or transcripts, of a witness's testimony because these are all clear examples of the "documented evidence" of a witness's testimony").
[76] Decision, para. 31.
[77] Decision, paras. 30, 32.
[78] WGLL Report, Annex II.A, para. 13.
[79] WGLL Report, Annex II.A, para. 2.
[80] Decision, para. 32.

rule change.

47. While the Majority failed to give effect to the ordinary meaning of "testimony", it did attempt to consider the term in context and in light of its purpose. Nevertheless, as argued below, this contextual analysis was too narrow and the purposive interpretation does not withstand scrutiny.

48. The only provision to which the Majority referred to inform its interpretation of "prior recorded testimony" was Rule 68(2)(b). The Majority noted that:

> *"Rule 68(2)(b) of the Rules has a sworn declaration requirement, whereas Rule 68(2)(c) and (d) do not. If an oath or affirmation were a prerequisite to qualifying as prior recorded testimony, then the requirement included in Rule 68(2)(b) would be superfluous."*[81]

49. As observed in the Partly Concurring Opinion, the declaration requirement of Rule 68(2)(b)(ii) "is not a conclusive view on the matter, capable of removing all doubts to the effect of diminishing 'testimony' out of all traditional usage" for the following reasons.[82] First, "r 68 does not make sufficiently clear that, for its own purposes, the ordinary meaning of 'testimony' (requiring the element of oath or affirmation) no longer applies".[83] Second, a wider consideration of Rule 68's legal context shows that the terms "testimony" and "statement" are used independently in the Rules and Statute and, thus, that there is a distinction to be made between them. The clearest example of this distinction is found in Article 56 of the Statute where, in the event of a unique investigative opportunity, "testimony or a statement" may be taken from a witness.[84] Third, that the distinction to be made between "statement" and "testimony" is the presence of an oath or affirmation is supported by a review of the Court's legal instruments and case law. As Judge Eboe-Osuji identified, Article 69 of the Statute "speaks of

[81] Decision, para. 32.
[82] Partly Concurring Opinion, para. 20.
[83] Partly Concurring Opinion, para. 20.
[84] *See also* Statute, Article 19(8) "Pending a ruling by the Court, the Prosecutor may seek authority from the Court…(b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge."

the verb 'testifying' and its derivative noun 'testimony', providing that '*before* testifying, each witness shall, in accordance with the Rules…, give an undertaking as to the truthfulness of the evidence to be given…".[85] This provision, imposing the requirement of a solemn undertaking, is immediately followed by Article 69(2) which refers to "[t]he testimony of a witness at trial". Linked to this chain is Rule 66 which "specifically provides for the undertaking that each witness must give '*before* testifying' – i.e. before giving their testimony."[86] In the Statute and Rules the term "testimony" is, therefore, inextricably linked to the presence of an oath or affirmation. In contrast, the term "statement" is not, as is evident from Rules 111 and 112. However, the jurisprudence does show that "testimony" can be subsumed within the term "statement", such as for the purposes of disclosure under Rule 76 of the Rules.[87] But, while "testimony" may fall within the term "statement", there is no support for the assertion that the converse is true. Accordingly, "prior recorded testimony" in Rule 68 must be interpreted narrowly and does not extend to unsworn statements.

50. In sum, the Defence agrees that "what r 68(2)(b)(ii) really does in context is highlight confusion or ambiguity in the drafting of an important legal text" which, given that recourse is being made to the provision in a criminal trial to admit incriminatory out-of-court statements into evidence, should be resolved in the accused's favour pursuant to the principle of *in dubio pro reo*.[88]

51. Finally, the Majority's conclusion that its interpretation of "prior recorded testimony" is consistent with the purpose of amended Rule 68 is wrong.[89] The primary purpose of amending the Rule was "to reduce the length of Court

[85] Partly Concurring Opinion, para. 20 (emphasis in original).
[86] Partly Concurring Opinion, para. 20 (emphasis in original).
[87] ICC-02/05-03/09-295, para. 23; ICC-01/09-01/11-743-Red, para. 20.
[88] Partly Concurring Opinion, para. 21. *See also*, *e.g.*, *Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 October 1998, para. 73.
[89] Decision, para. 32.

proceedings and streamline evidence presentation".[90] However, in paragraph 32 of the Decision, the Majority erroneously equates the Rule's purpose with facilitating the admission of Prosecution witness statements and transcripts in their current standard form which do not require an oath or affirmation.[91] Such a consideration is irrelevant and should not have played any role in the Majority's interpretation of "testimony". Moreover, as noted in the Partly Concurring Opinion, restricting "testimony" to evidence given under oath or affirmation will shorten and streamline proceedings by addressing some of the concerns currently raised regarding the accuracy, trustworthiness and forensic value of the materials to be admitted under the Rule all of which threaten to lengthen trials and render them more complex.[92]

52. For the reasons set out above, the Majority erred by determining that written statements taken in accordance with Rule 111 of the Rules can qualify as "prior recorded testimony" for the purposes of Rules 68(2)(c) and (d) and, thus, may be admitted for the truth of their contents. Had the Majority not erred, the prior statements and related material of the Rule 68 Witnesses would not have been admitted. Thus, the Second Ground of Appeal should be granted.

[90] WGLL Report, para. 11.
[91] Decision, para. 32. Note the statement that "[l]imiting 'prior recorded testimony' only to testimony sworn under oath or affirmation would…severely limit the practical application of the amended Rule 68".
[92] Partly Concurring Opinion, para. 18.

III. Third Ground: Error in the Interpretation of "Failure to Give Evidence with respect to a Material Aspect"

53. Rule 68(2)(d)(i) provides that prior recorded testimony may only be introduced if "the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony". The Majority found that a witness who appears, but whose testimony deviates from his/her prior recorded testimony, falls within the scope of the rule.[93] In doing so, it erred in law.

54. The Majority erred because it once again failed to interpret a provision, in this case Rule 68(2)(d)(i), in accordance with its "ordinary meaning", in context and in light of its object and purpose.[94] Interpreting the sub-Rule in accordance with this approach establishes that it does not apply in the present case. This is because all the witnesses at issue, save for [REDACTED], "attended" but did not "fail[] to give evidence with respect to a material aspect included in [REDACTED]…prior recorded testimony". More concretely, it is not the case that the witnesses refused to give evidence in relation to material subjects covered in their original accounts. They did give evidence on those very areas but stated under oath that the information provided thereon in their unsworn statements was false. Put another way, the Defence submits that, if the first precondition of Rule 68(2)(d)(i) is interpreted in accordance with its ordinary meaning, a party is not permitted to seek the admission of prior recorded testimony in circumstances where the witness attends and there is a departure between what was said out of court and what was said under oath. The drafters could have included such an express condition in the sub-Rule if this was intended. Crucially, they did not.

55. That Rule 68(2)(d) is intended as a mechanism through which to place evidence which is otherwise unavailable (whether the unavailability is due to non-attendance or a refusal to testify) before a Chamber is supported by reading the

[93] Decision, para. 41. *See also* paras. 48, 72, 102, 121.
[94] VCLT, Article 31(1). *See also* Partly Concurring Opinion, para. 19.

sub-Rule in context and in light of its object and purpose.

56. Placing Rule 68 in context and, thus, within the wider legal framework of the Court, an exercise the Majority failed to undertake, engages Article 69(2) of the Statue. This Article underlines the primacy of the principle of orality but provides that exceptions may be made thereto including in the Rules. Rule 68 is one such exception. The link between these provisions establishes that the preference is for oral testimony and that it is only in exceptional circumstances that such testimony should be replaced by prior recorded testimony. The Defence submits that such an exception does not arise where there is sworn testimony already before the Court but that testimony departs from the witness' previous account. To find otherwise would undermine the principle of orality.

57. To the extent that the Majority purported to interpret the precondition purposively, it failed to do so properly as is evident from its cursory discussion of the point in the Decision.[95] The correct position is that the amended Rule was intended to plug the perceived gap caused by the absence of a subpoena power.[96] One of the situations which would trigger recourse to Rule 68 would be where a witness failed to appear because of interference. Effectively, a mechanism was sought to ensure that in certain limited circumstances the Court would not be denied access to relevant evidence. Following this Chamber's judgment which found that Trial Chambers at this Court do have the power to compel witnesses to appear before them, this purpose is now redundant.[97] Accordingly, in order to give proper effect and meaning, not only to the principle of orality, but also to the power to compel, the Court should be slow to permit the Prosecution to replace a compelled witness' sworn oral testimony with their prior written statements when they have not refused to testify but have simply departed under oath from the out of court, unsworn statements.

[95] Decision, para. 41.
[96] WGLL Report, Annex II.A, para. 6.
[97] ICC-01/09-01/11-1598.

58. Indeed, the following statement of the Working Group on Lessons Learnt underlines that it was never intended that amended Rule 68 would result in a Chamber being faced with two different versions of a witness' evidence and that where a witness actually testified any previously admitted prior recorded testimony would be disregarded:

> *"[A] situation may occur in which the improper interference comes to an end, and the witness is again willing to testify. It is therefore possible for there to be situations in which prior recorded testimony is introduced into evidence under rule 68(2)(d), but, due to changed circumstances, the formerly intimidated witness is now available to testify in full. If, in such a case, the prior recorded testimony was not independently admissible under any other part of rule 68, logic would dictate disregarding that testimony in evidence."*[98]

59. By interpreting Rule 68 so as to ensure that the record is not cluttered with differing versions of the same witness' evidence all of which may be considered for truth gives effect to the other stated purpose for amending Rule 68 which was to make trials simpler and shorter.[99] To admit the prior recorded testimony of recanting witnesses who have appeared and testified before the Court for the truth of its contents rather than impeachment does not "streamline the presentation of evidence".[100] Rather, it lengthens proceedings and undoubtedly makes them more complex because judges will be required, when considering a 'no case to answer' motion or during final deliberations, to compare the two inconsistent accounts to determine where the truth lies.[101] Indeed, the difficulties and complexities which arise in the present case are particularly acute because the Prosecution failed to address the veracity of the original accounts of the

[98] WGLL Report, Annex II.A, para. 35. *See also* WGLL Report, Annex II.A, fn. 15 ("In rule 68(2)(c) and rule 68(2)(d), the introduction of prior recorded testimony that goes to the proof of the acts or conduct of the accused is discouraged, although it is not prohibited. This distinction is justified by the fact that it is not possible to call a witness to provide testimony regarding acts and conduct of the accused under rules 68(2)(c) and 68(2)(d), given that those sub-rules apply to unavailable and intimidated witnesses respectively").
[99] WGLL Report, para. 11.
[100] WGLL Report, para. 11.
[101] *See* Partly Concurring Opinion, para. 18. *See also Prosecutor v. Limaj et al*, IT-03-66-T, Judgement, 30 November 2005, para. 14 ("the video-recordings and transcripts of the prior video-recorded interviews of two Prosecution witnesses, which revealed material inconsistencies with their oral evidence in court, were in the particular circumstances admitted as substantive evidence…The considerations discussed above have made the task of the Chamber, to determine where the truth lies in these inconsistent accounts, undoubtedly more complex. At times, the Chamber has been unable to make such determinations and has had to leave the evidence aside altogether.")

recanting witnesses via independent, objective evidence despite the repeated pleas of the Defence.[102]

60. The foregoing establishes that the admission of prior recorded testimony under Rule 68(2)(d) was never intended to replace in-court testimony unless the witness failed to attend or refused to testify on "material aspects". Therefore, contrary to the Majority's conclusion, there is a meaningful distinction between the situation where a person subject to interference is intimidated into silence and that where the intimidation prompts them to recant fundamental aspects of what they said previously.[103] In the former case, there is no evidence but silence and the Trial Chamber may accept the previous statement to fill the gap created by the interference. In the latter, a witness has testified under oath, and the Trial Chamber must simply assess the sworn evidence, rather than the unsworn prior recorded statement for the truth of its contents. To adopt any other approach would be to do precisely the opposite of what was intended by the Rule. Efficiency and more expeditious trials would be replaced with longer and more convoluted ones.

61. In short, the Majority erred in its assessment of the concept of 'failure to give evidence with respect to a material aspect' pursuant to Rule 68(2)(d)(i) of the Rules. Had it not erred, the prior statements of [REDACTED] would not have been admitted. The Third Ground of Appeal should be granted.

[102] [REDACTED]
[103] Decision, para. 41.

IV. Fourth Ground: Error in relation to the Appropriate Standard of Proof

62. In the Decision, the Majority failed to apply the appropriate standard of proof when evaluating whether the conditions under Rules 68(2)(c) and (d) of the Rules were met, including in its assessment of whether [REDACTED] were subjected to "interference".[104]

A. Failure to articulate the appropriate standard of proof

63. In relation to the appropriate standard, the Majority erred in law by finding that it need only apply the terms used in Rule 68(2)(c) and (d), that is "satisfied".[105] No further elucidation was given as to what is meant by "satisfied". The Majority's statement that "evidence of sufficient specificity and probative value must be provided to satisfy the Chamber" does not assist because the threshold to which the Chamber must be satisfied remains unknown.[106] For example, does a fact have to be "more likely than not" or does it have to satisfy a Chamber to a certain percentage? Further, the amount, quality and type of "evidence of sufficient specificity and probative value" which might have to be submitted to reach the necessary standard remains similarly undefined and unreviewable.

64. In these circumstances, it was incumbent on the Majority to stipulate the evidential standard a party must meet in order to satisfy the various conditions set out in Rules 68(2)(c) and (d). The Defence submits that the relevant evidential standard is "beyond reasonable doubt" for the following reasons.[107]

65. *First*, while the Majority correctly observed that "[t]he Court's case law has not typically articulated any particular standards of proof for considering the factual certainty required when evaluating procedural motions",[108] the Majority failed to recognise that the Application is not an ordinary procedural motion concerning the admissibility of documentary evidence where questions of reliability,

[104] Decision, paras. 37, 55, 78, 79.
[105] Decision, para. 37.
[106] Decision, para. 37.
[107] The assertion that the standard is "balance of probabilities" is notably unsupported (Application, para. 62).
[108] Decision, para. 36.

relevance and probative value can be gleaned from the face of the document. Rather, applications made under Rules 68(2)(c) and 68(2)(d) concern the admissibility of testimonial evidence in exceptional circumstances and the preconditions of these sub-Rules involve the determination of questions of fact and law.[109] These scenarios engage an accused's right to confront, the prejudicial taint of the existence of witness interference (whether or not an accused is alleged to have been involved) and overarching issues of trial fairness. That such applications must be strictly determined is apparent from their preconditions which go beyond the usual three-part admissibility test.

66. *Second*, and in the absence of authority in this Court's jurisprudence, the Majority failed to have regard to the persuasive case law of the *ad hoc* tribunals where, in certain cases, the Prosecution was required generally to prove factual questions regarding the admissibility of evidence beyond reasonable doubt[110] including in a case where, as here, the documentary evidence was "voluminous and…of particular importance."[111] The Defence acknowledges that beyond reasonable doubt has not been the standard generally applied to the admission of evidence in all cases at the *ad hocs*. It can reasonably be assumed that this is because, as observed by the Trial Chamber in *Delalić et al*, "often documents are sought to be admitted into evidence, not as ultimate proof of guilt or innocence, but to provide a context and to complete the picture presented by the evidence gathered."[112] However, such uncontroversial evidence is not at issue in the present proceedings. Rather, it is evidence provided by "linkage" witnesses stated to be "necessary to prove [the Prosecution's] case".[113] In these

[109] *See*, Sprack, J. (2012), *A practical approach to criminal procedure* (14th ed.), Oxford University Press, para. 20.36 ("Sometimes…admissibility depends upon the circumstances in which the evidence was obtained, and those circumstances may themselves be in dispute. It is then for the judge to decide (i) the factual question of how the prosecution got the evidence, and (ii) the legal question of whether, in the light of his findings in fact, the evidence is admissible.").
[110] *Prosecutor v. Orić*, IT-03-68-T, Order Concerning Guidelines on Evidence and the Conduct of Parties during Trial Proceedings, 21 October 2004, p. 5, (ii). *See also Prosecutor v. Orić*, IT-03-68-T, Judgement, 30 June 2006, paras. 12-13.
[111] *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, 1 September 2004, para. 29.
[112] *Prosectuor v. Delalic et al*, IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evience, 19 January 1998, para. 20.
[113] Application, para. 52.

circumstances, ICTY and ICTR jurisprudence supports the imposition of the criminal standard because "the rights of the Accused are threatened by the admission of the evidence in question"[114] and/or "the nature of the issue demands for admissibility the most exacting standard consistent with the allegation".[115] Further support for this approach is also found in domestic practice. The criminal standard is applicable in England and Wales in relation to the admission of prior statements in circumstances similar to the those envisaged in Rules 68(2)(c) and 68(2)(d).[116]

67. *Third,* the fact that Rule 68(2)(d)(iii) states that a "Chamber may consider adjudicated facts from…[completed Article 70] proceedings in its assessment" supports the conclusion that it is the criminal standard of proof 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.

B. Failure to properly assess the existence of "interference"

68. Even if the approach to the standard of proof is held to be correct, the Majority failed to apply it and committed a clear error when assessing whether [REDACTED] were subjected to "interference" for the purposes of Rule 68(2)(d)(i). The Defence submits that the Majority's conclusion could not have reasonably been reached from the evidence before it and, thus, corrective appellate intervention is required.

69. Paragraph 55 of the Decision sets out the basis on which the Majority states it is "satisfied" that [REDACTED] "was influenced by improper interference". An analysis of this paragraph establishes that the basis on which the Majority satisfied itself was not on "evidence of sufficient specificity and probative value"

[114] *Prosecutor v. Musema*, ICTR-96-13-A, Judgement and Sentence, 27 January 2000, para. 58.
[115] *Prosectuor v. Delalic et al*, IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, para. 42.
[116] *Archbold*, *supra*, para. 11-17; *R. v. Minors* 89 Cr.App.R. 106, para. 6; *R v. Shabir* [2012] EWCA Crim 2564, para. 64.

but, rather, on no evidence. Specifically, the Majority stated that it was "satisfied" that interference had occurred and influenced the witness' recantation "particularly considering the similarities with the pattern of interference of the other Concerned Witnesses".[117] This finding appears to be based on the Prosecution's assumption that [REDACTED][118] (*i.e.* [REDACTED][119]) were in charge of [REDACTED]. However, the weakness in adopting this assumption is revealed in the language used by the Majority that [REDACTED] and that this "could lead the Chamber to infer that [REDACTED]."[120]

70. The reality is that Prosecution conjecture rather than evidence underpins any purported similarities. [REDACTED].[121] [REDACTED].[122] [REDACTED].[123] At no point did the Prosecution ask the witness if [REDACTED] was mistaken and whether [REDACTED]. Instead, the Prosecution consistently referred to the [REDACTED]. Indeed, the Senior Trial Attorney conceded to the Bench that [REDACTED].[124] The peril of relying on unsupported Prosecution conjecture is revealed by a basic internet search that shows that [REDACTED][125] and another [REDACTED].[126] [REDACTED].[127]

71. Additionally, analysis of the Decision reveals that the conclusion that [REDACTED] is the product of Prosecution speculation rather than evidence.[128]

72. The Majority's conclusion that [REDACTED] were involved in the improper interference of [REDACTED] is a clear error which could not reasonably have been reached on the evidence before it.[129] The Majority does not refer to any

[117] Decision, para. 55.
[118] Decision, para. 53.
[119] Application, paras. 94, 188.
[120] Decision, para. 55.
[121] [REDACTED]
[122] [REDACTED]
[123] [REDACTED]
[124] [REDACTED]
[125] [REDACTED]
[126] [REDACTED]
[127] [REDACTED]
[128] [REDACTED]
[129] Decision, para. 55.

evidence which shows that either witness improperly interfered with [REDACTED] in respect to [REDACTED] in-court testimony. The correct position, and one which the Majority was seemingly aware of, is that these witnesses were involved with [REDACTED] in relation to [REDACTED] original statement "when the witness was first approached by the Prosecution".[130] This initial contact has nothing to do with [REDACTED] testimony before the Chamber. Indeed, based on the Majority's reasoning, if [REDACTED] were involved in the improper interference of [REDACTED], it is with respect to [REDACTED] prior statement which is the "testimony" admitted for the truth of its contents pursuant to the Decision. This further underlines that a clear error has occurred.

73. None of the remaining evidence concerning [REDACTED] in the witness [REDACTED], alleged threats and financial difficulties could reasonably provide sufficient basis for the Majority to be "satisfied" that not only was [REDACTED] the subject of interference but that [REDACTED] failure to give evidence in line with [REDACTED] original statement was materially influenced by such interference.[131] Any other conclusion would be based on speculation and improper inference rather than evidence before the Chamber.

74. As regards [REDACTED], again the Majority's clear error in assessing the existence of "interference" is demonstrated by the absence of evidence underlying its finding that it is "satisfied that the witness was the subject of improper interference and that this interference materially influenced the evidence provided by [REDACTED]".[132] As set out in paragraph 78, the Majority relied on evidence which, at its highest, shows that [REDACTED] was involved in an alleged plan to deliver money to [REDACTED] and associated with [REDACTED]. No other evidence is referred to. However, this evidence cannot reasonably be construed as showing that [REDACTED] was [REDACTED] the

[130] Decision, para. 55.
[131] Decision, para. 55.
[132] Decision, para. 79.

subject of any interference (as opposed to [REDACTED]) and, further, that [REDACTED] failure to give evidence in line with [REDACTED] original statement was materially influenced by [REDACTED] alleged involvement in a scheme to deliver money to [REDACTED]. Thus, it is clear the standard was improperly applied because there is no "evidence of sufficient specificity and probative value" on which the Majority can be "satisfied" that interference occurred.

75. As argued above, the Majority failed to apply the appropriate standard of proof when evaluating whether the conditions under Rule 68(2)(c) and (d) of the Rules were met. Had the Majority assessed the evidence in accordance with the correct standard, it would have refused to admit the materials relating to the Rule 68 Witnesses. In the alternative, even if the standard applied is correct, the Majority failed to correctly apply it in its assessment of the existence of 'interference' in respect of [REDACTED] and committed a clear error. Therefore, the prior written statements and related material of these witnesses were incorrectly admitted into evidence. The Fourth Ground of Appeal should, therefore, be granted in whole or in part.

V. Fifth Ground: Error in relation to the Interpretation and/or Application of "Indicia of Reliability" and "Acts and Conduct of the Accused"

A. The Majority erred in its interpretation and/or application of "indicia of reliability"

76. In considering the factors to which a Chamber may have regard when assessing whether prior recorded testimony has "sufficient indicia of reliability" pursuant to Rules 68(2)(c)(ii) and (d)(i) of the Rules, the Majority correctly determined that, in line with the jurisprudence of this Court and other international tribunals, a broad approach should be taken.[133] The Majority found that a "Chamber can take into account the circumstances in which the testimony arose", "its content" and "indicia…that go beyond the circumstances in which the testimony arose".[134] The Majority also found that these indicia are "non-exhaustive".[135] Notwithstanding these general determinations, for each of the Rule 68 Witnesses, the Majority failed to apply its stated broad approach and assessed reliability by reference to "formal indicia of reliability" alone.[136] In so doing, the Majority erred in the exercise of its discretion.

77. At the outset, the Defence acknowledges that, when assessing reliability at the point of admission, "no one indicator is definitive" and, "even where one or more of the indicia are absent the Chamber may still admit the material, and can consider the absence of such indicia, together with other relevant factors, when ultimately weighing all of the evidence before it."[137] However, as more fully argued below, the Majority's approach cannot be explained as falling within this jurisprudence. The present litigation does not concern the absence of indicia. It concerns, instead, a considerable number of factors, all of which are present and highly relevant to the reliability of the prior statements, and which should have been properly considered by the Majority in the exercise of its discretion.

[133] Decision fns. 99-101.
[134] Decision, para. 65.
[135] Decision, para. 65.
[136] Decision, paras. 66, 85, 115, 132, 144.
[137] Decision, para. 65 (footnotes omitted).

1. Abuse of discretion in assessment of "formal indicia of reliability"

78. The Majority established "formal" reliability by the fact that the Prosecution had taken the statement, that it had been signed by the witness and the members of the Prosecution who conducted the interview and that the statement included a signed "Witness Acknowledgement" confirming that the statement was given voluntarily, is true to the best of the witness' knowledge and recollection and may be used in legal proceedings before the Court.[138] It was on this skeletal basis that all the prior statements were considered to bear "sufficient indicia of reliability".

79. Indeed, this skeletal assessment is in part due to the Prosecution's failure to put in place the measures necessary to preserve its evidence in its most reliable form. As a consequence, the Prosecution has not given the judges the necessary tools to assess *prima facie* reliability. In contrast, in the *Limaj* case, the ICTY Trial Chamber was given the means to independently verify what had transpired at the interview and observed:

> *"With respect to the issue of reliability, each interview was conducted with some formality. It was an official interview by the OTP. The whole interview was recorded by video equipment so that there is both a sound and a visual record of the interview of each witness. Interpreters were used, and the complete interpretation process, of both questions and answers, is revealed by the video recording. Further, the interpretations made during each interview have since been reviewed by interpreters of the Tribunal and an "officially accurate" transcript in English has been provided to the Chamber, so that it is possible to assess situations where any looseness of interpretation during the interview may have led to misunderstanding, either by the questioner or the witness. As each question and answer is recorded, it is also possible to assess any possible influence of the questioning on the answers of the witness. The video-recording of each interview also allows the Chamber to observe and assess the demeanour and credibility of the witnesses in April 2003."*[139]

80. Even if *prima facie* reliability for the purposes of Rule 68 can be limited to the four corners of the statement (which the Defence does not accept), the Majority's

[138] Decision, paras. 66, 85, 115, 144.
[139] *Prosecutor v. Limaj et al*, IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, para. 22.

assessment was deficient and reveals a failure to exercise its discretion judiciously. Further, as argued below, the Majority failed to consider or properly weigh all the factors present and relevant to assessing "formal" reliability.

(i) Failure to exercise discretion judiciously

81. The Majority's failure to exercise its discretion judiciously is apparent from a cursory analysis. Taken to its logical conclusion, 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", regardless of the party which prepared them, their content or that they are contradicted by other evidence on the record. Put in these plain terms, it is clear that this cannot be correct and the Majority's approach to assessing reliability is flawed.

82. An added concern is that the Majority's superficial approach was informed by affording a premium to the source of the statements, the Prosecution.[140] This is also incorrect and raises equality of arms issues. If the Majority's approach is confirmed by this Chamber, then it must apply to all parties.

(ii) Failure to consider and properly weigh other factors present and relevant to "formal" reliability

83. None of the statements at issue were given under oath. However, the Majority considered that the absence of an oath could be addressed by the inclusion of the above described "Witness Acknowledgement" in the statements.[141] In reaching this conclusion, the Majority failed to consider whether such a measure is sufficient to ensure the truthfulness of a statement in the particular circumstances of this case. Specifically, all the Rule 68 Witnesses, save [REDACTED], have testified under oath and under penalty of Article 70 sanction that their original accounts to which the Witness Acknowledgements are appended are untrue. But

[140] Albeit in the context of a discussion on a different issue, Judge Eboe-Osuji queried whether the Prosecution will be willing to apply the term "testimony" to out-of-court statements prepared by the Defence. *See* Partly Concurring Opinion, para. 25.
[141] Decision, para. 65.

at no point did the Majority critically address the question as to why the unsworn, disavowed, out-of-court statements to which a bare Witness Acknowledgement is appended are to be preferred over the sworn testimony of the witnesses. This omission was compounded by the failure to place both the statements and testimony in their wider context when assessing *prima facie* reliability where a number of other factors indicate that, separate to any issue of interference, the witnesses' sworn disavowals are to be preferred over the original statements (see below).

84. In addition, the Majority failed to consider that the factors which it identified as establishing "formal indicia of reliability" do not assist in assessing the reliability of the contents of the statements.[142] None of the statements admitted under the Decision are *verbatim* records of what happened at the interviews taken by a neutral third party but are summaries prepared by one of the parties to the proceedings.[143] Given that the Defence were not present at the interviews nor were the interviews audio or video recorded, the Defence and the Chamber have no way of verifying that all the information imparted during the interviews has been fully and accurately recorded in the statements. This is significant in light of the materials which were placed before the Trial Chamber but disregarded indicating that Prosecution statements are, at best, incomplete and, at worst, selective, omitting important exculpatory evidence.[144]

85. Specifically, the Majority failed to consider the comparison prepared by the Defence of the information provided in the transcript of the audio recordings of the Prosecution's 2010 interviews with [REDACTED] with the witness' signed

[142] *Contra Prosecutor v. Limaj et al*, IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, para. 22.
[143] *See* Judge Ozaki's apposite comments: "unlike in certain domestic jurisdictions, witness statements at the ICC are not taken in neutral, impartial circumstances. They are taken by a party (often by an investigator), mainly in order to gather evidence to mount a case against an accused, and without the supervision of any impartial arbiter. These witness statements are taken with the intention of summarising a witness's oral evidence that will be given at trial and act as a guide or preview of this evidence which is disclosed to the defence" (ICC-01/05-01/08-1028, para. 11).
[144] ICC-01/09-01/11-1908-Conf-Corr, para. 117 and Annex E.

Prosecution statement.[145] Despite repeated requests, no Prosecution transcripts of the 2010 interviews were provided to the Defence. Therefore, the Defence produced the necessary transcripts.[146] A comparison of the transcripts with the information recorded in (or omitted from) the statement revealed that there are serious defects in the statement that raise profound questions about the reliability of OTP statements and whether they are "fit for purpose".[147] The comparison showed that exculpatory evidence is repeatedly omitted from the statement. Similarly, material inconsistencies are not recorded in the statement even when these are crucial and cast doubt on the veracity and reliability of the witness's account. The result is that [REDACTED] statement is not an accurate distillation of what the witness actually said during the interview. The Defence submits that the implications raised by the comparison exercise are far wider than [REDACTED] and impact the reliability of all OTP statements and the processes by which they were taken. The Majority erred by failing to properly weigh this important information.

86. In relation to concerns regarding the ability to verify the contents of the prior statements, it is important to note that both [REDACTED] and [REDACTED] implicated the Prosecution in the production of the evidence contained in their prior statements and [REDACTED].[148] The Defence does not believe that the Prosecution was involved in the deliberate fabrication of evidence. However, the witnesses' allegations stand in marked contrast to the position in *Limaj* where "[t]he circumstances in which the material was presented and discussed in court provide[d] further evidence of its reliability. The witnesses acknowledged in court, under oath, having given the prior interviews and generally having been truthful in doing so."[149]

[145] ICC-01/09-01/11-1908-Conf-AnxE.2 (Statement of [REDACTED], [REDACTED] 2010).
[146] ICC-01/09-01/11-1908-Conf-AnxE.1 (Transcripts of [REDACTED] interview).
[147] ICC-01/09-01/11-1908-Conf-AnxE.4 (Comparison chart).
[148] [REDACTED]
[149] *Prosecutor v. Limaj et al*, IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, para. 23.

87. As the Majority acknowledged, language issues arose in respect of two of the Rule 68 Witnesses, [REDACTED] and [REDACTED].[150] The original interviews of both were conducted in English with no interpreter present.[151] In contrast, in court [REDACTED] was permitted to give [REDACTED] answers in Swahili when necessary[152] and [REDACTED] testimony was eventually conducted in Swahili.[153] However, rather than properly weighing the language difficulties as a factor which would have had a negative impact on the *prima facie* reliability of the original statements, the Majority disregarded it, finding that it did not make the statements unreliable *per se* and could be considered in final deliberations.[154] In respect of [REDACTED], the Majority also observed that, during testimony, the witness confirmed that [REDACTED] was able to understand English, follow a conversation and chose to answer partly in English, partly in Swahili.[155] But, with respect, none of the foregoing provides any reassurance about the reliability of the original statements. No interpreter was present at the original interviews and so the witnesses had no opportunity to impart information using both languages, as they clearly needed to do during testimony. Therefore, the overall accuracy and reliability of the statements are open to serious question, particularly where there are no means of verifying to what extent the witnesses experienced language difficulties via an audio/video recording. This factor should have been properly weighed at the point of admission but was not.

88. While the fact that [REDACTED] had recourse to [REDACTED] during [REDACTED] 2012 interview was noted, the Majority erred by failing to consider this matter further when assessing the reliability of [REDACTED] prior statement and whether that prior statement should be admitted for the truth of its

[150] Decision, paras. 67, 116.
[151] *Contra Prosecutor v. Limaj et al*, IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, para. 22.
[152] [REDACTED]
[153] [REDACTED]. Initially, the Chamber held that [REDACTED] should listen to the questions in English and answer in either English or Swahili ([REDACTED]).
[154] Decision, paras. 67, 116.
[155] Decision, para. 116.

contents.[156] Of concern is that, during the 2012 interview, [REDACTED] did not permit the investigators to [REDACTED].[157] Clearly, no witness should be permitted to [REDACTED], [REDACTED], but deny [REDACTED] interviewers the opportunity to [REDACTED]. However, the [REDACTED] takes on an added significance because the witness testified that [REDACTED] to assist [REDACTED] in providing false information.[158] In the context of litigation about fabricated evidence, this matter should have been properly weighed by the Majority when assessing the *prima facie* reliability of this witness' prior statement.

2. *Abuse of discretion by failing to consider and properly weigh other relevant factors beyond the circumstances in which the testimony arose*

89. Despite the Majority's express recognition that it could also consider "the absence of manifest inconsistencies…and whether the evidence is corroborated by other evidence"[159] and the fact that all these factors affected the prior statements at issue and were set out in detail in the Defence response, the Majority either neglected to consider them or gave them insufficient weight. The Majority's error was particularly serious because the hearsay evidence at issue is central to the Prosecution's case. The greater the importance of hearsay evidence to a case, the greater the need to ensure its reliability.[160]

90. In relation to corroboration, the existence of supporting evidence is one of the most effective indicators of the *prima facie* reliability of hearsay evidence because it reduces the risk of "deliberate untruth and innocent mistake".[161] But one of the most glaring features of the Rule 68 Witnesses' prior statements is the absence of any corroboration for the linkage evidence therein incriminating Mr. Ruto. Yet,

[156] Decision, para. 63.
[157] [REDACTED]
[158] [REDACTED]
[159] Decision, para. 65.
[160] *See R v. Y*, [2008] 1 Cr.App.R 34, para. 59; *R v. Ibrahim*, [2012] 2 Cr.App.R. 32, para.91; *Riat (Jaspal)*, *supra*, para. 18. These authorities are persuasive because legislative developments in England and Wales regarding the admission of hearsay statements mirror Rule 68.
[161] *Riat (Jaspal)*, *supra*, para. 6. *See also* ICC-01/09-01/11-1399, para. 40; *Prosecutor v. Milutinović et al.,* IT-05-87-T, Decision on Prosecution's Motion for Admission of Evidence pursuant to Rule *92quater*, 16 February 2007, para. 7.

when assessing reliability, this absence was completely ignored by the Majority. This failure to consider what should have been a central factor in the reliability assessment amounts to an abuse of discretion.

91. Another striking feature of the Rule 68 Witnesses' prior statements is that on several material points they are contradictory *inter se* and/or with other trial evidence. These inconsistencies, set out in detail in the Defence response to the Application,[162] do not depend on considered evaluations of complex evidence but are apparent from a cursory review of the statements and from a comparison with other trial evidence, generally independent media reports admitted on the record. However, these inconsistencies were only recognised by the Majority in respect of [REDACTED] and [REDACTED] but were found to be outweighed by the "formal indicia of reliability".[163] Confining the reliability assessment to the four corners of the statements in the face of a significant body of contradictory evidence was an abuse of discretion because it gave undue weight to "formal indicia of reliability". The only assurance such indicia can objectively provide is that the statement was taken.

92. Finally, the Majority failed to accord proper weight to the Rule 68 Witnesses' motivations and background. Specifically, the Majority failed to consider as part of the reliability assessment that: (i) the witnesses stood to gain considerable benefits, financial and otherwise, by becoming Prosecution witnesses; (ii) each witness (save for [REDACTED]) was a PNU supporter; and (iii) the majority of the Rule 68 Witnesses knew each other and other trial witnesses.[164] The only reference made to the witnesses' motivations was in respect of [REDACTED] where the Majority stated that these "may be relevant in the ultimate weighing of evidence" but were not sufficient to render the witness' prior statements

[162] *See* ICC-01/09-01/11-1908-Conf-Corr, paras. 150-154 [REDACTED], 170-175 [REDACTED], 184-190 [REDACTED], 214-216 [REDACTED].
[163] Decision, paras. 86, 117.
[164] *See* ICC-01/09-01/11-1908-Conf-Corr, paras. 125, 128, 129, 145, 159-161, 182-183, 211.

inadmissible.[165] The failure to accord sufficient weight to these factors as part of the admissibility assessment amounts to an abuse of discretion because it conflicts with the Majority's own finding that a broad approach to assessing reliability is required.

B. The Majority erred in its application of "acts and conduct of the accused"

93. Before prior recorded testimony may be admitted under Rule 68, Rules 68(2)(c)(ii) and (d)(iv) expressly require the Chamber to consider whether the testimony "goes to proof of acts and conduct of an accused" because this "may be a factor against its introduction, or part of it".[166] In the Decision, the Majority erred by failing to apply and meaningfully consider this separate and independent limb of the Rule 68 test.[167]

94. [REDACTED] is the only witness whose prior statements were admitted under Rule 68(2)(c). A review of the relevant part of the Decision, paragraphs 134 to 145, shows that the Majority made no mention of Rule 68(2)(c)(ii) nor did it consider at any point when assessing whether or not to admit [REDACTED] evidence that this witness' evidence goes to proof of the acts and conduct of Mr. Ruto. The remainder of the Rule 68 Witnesses' prior statements were admitted under Rule 68(2)(d). In respect of this material, the Majority made two errors. In the first place, the Majority failed to consider the express terms of Rule 68(2)(d)(iv). Instead, when assessing whether the interests of justice were best served by admission, as required by Rule 68(2)(d)(i), the Majority briefly noted that the materials of each of the Rule 68 Witnesses go to the acts and conduct of the accused but that the defence were able to cross-examine the witnesses.[168] Secondly, in the same paragraphs of the Decision dealing with the interests of justice limb of the Rule 69(2)(d)(i) test, the Majority contradicted its earlier perfunctory consideration of the "acts and conduct" issue by stating that it will

[165] Decision, para. 143.
[166] Rule 68(2)(c)(ii) and (d)(iv).
[167] The Defence notes that the Prosecution also did not separately consider this limb of the Rule 68(2)(c) and (d) test in the Application and only made one passing reference to "acts and conduct" evidence in paragraph 140.
[168] Decision, paras. 60, 81, 111, 128.

consider whether the prior recorded testimonies go to the acts and conduct of the accused in its final deliberations.[169]

95. The Majority's failure to properly apply Rules 68(2)(c)(ii) and (d)(iv) is a clear error. These separate limbs of the Rule 68 test cannot be ignored, relegated to one sentence in the context of a discussion on another limb of the test or deferred until final deliberations. The express terms of the provisions dictate that the issue is to be meaningfully considered at the point of admission. The importance of Rules 68(2)(c)(ii) and (d)(iv) is evident from their plain language. Where the prior recorded testimony does go to proof of the acts and conduct of an accused, 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. The WGLL Report states that "Rule 68(2)(d)(ii) uses language which discourages the use of "acts and conduct" evidence, although the introduction of such evidence is not prohibited."[170] In essence, it can be seen that Rules 68(2)(c)(ii) and (d)(iv) are intended to act as one of the safeguards which give effect to the overarching direction in Rule 68(1) that prior recorded testimony can only be introduced if it would not be prejudicial to or inconsistent with the rights of the accused.

96. Separately, by failing to consider the "acts and conduct" limb of the Rule 68 test, the Majority failed to give effect to the Trial Chamber's own jurisprudence which underlines that caution must be exercised in relation to the admission of such evidence. Specifically, the Trial Chamber has recognised the "obvious interest on the part of an accused person to confront any person whose testimony (on the stand or through a document) would implicate an accused in criminal conduct".[171] This statement is particularly relevant in relation to the admission of [REDACTED] evidence because the Defence did not have an opportunity to cross-examine this witness. In addition, the Chamber has found that it would be

[169] Decision, paras. 60, 81, 111, 128.
[170] WGLL Report, Annex II.A, para. 38.
[171] ICC-01/09-01/11-1353, para. 25.

"unduly prejudicial to the accused to admit an item of…limited probative value if information therein goes to the acts and conducts of the accused, namely Mr Ruto, and members of his alleged network."[172] On this basis, it refused to admit a document from the bar table.

97. The Majority's failure to correctly apply one of the Rule 68 safeguards is particularly significant in this case. The Rule 68 Witnesses are "linkage"[173] witnesses who each provide hearsay evidence, uncorroborated in respect of the evidence directly implicating Mr. Ruto, and going to the acts and conduct of the accused. Their evidence is stated to be central to the Prosecution's case.[174] Bearing in mind that the Rule 68 Witnesses constitute just over a [REDACTED] of the Prosecution's witnesses, it is clear that the Prosecutor is seeking to prove the central plank of her case almost entirely via evidence admitted under Rule 68.[175] Indeed, the Defence is not aware of any case at the international or national level where hearsay evidence, on such a scale, and of such significance, has been admitted for the truth of its contents. Therefore, this is clearly a case in which careful consideration of the implications of admitting such a considerable body of evidence going to the acts and conduct of the accused was required. The Majority's failure to do so materially affected the Decision.

98. As shown above, the Majority erred in its interpretation and application of the concepts of "indicia of reliability" and/or "acts and conduct of the accused" pursuant to Rules 68(2)(c) and (d) of the Rules. Had it not erred, it would not have admitted the prior statements and related material of the Rule 68 Witnesses. The Fifth Ground of Appeal should, therefore, be granted.

[172] ICC-01/09-01/11-1931-Conf, para. 16.
[173] Application, paras. 131, 147, 165, 179, 215.
[174] Application, para. 52.
[175] [REDACTED]

VI. Sixth Ground: Error in consideration of "interests of justice", Rule 68(2)(d)

99. In considering whether "the interests of justice are best served by the prior recorded testimony being introduced", as required by Rule 68(2)(d)(i), the Majority's weighing and balancing of relevant factors was unreasonable and insufficiently reasoned.[176] As a result, the Majority erred in the exercise of its discretion.

100. *First*, the legal insufficiency of the Majority's reasoning and its failure to properly consider and weigh relevant factors is apparent from the outset of its discussion on the "interests of justice". In paragraph 60 of the Decision, the Majority correctly found that "the main purpose of Rule 68…is to expedite trial proceedings" and, therefore, "the notion of interests of justice should be linked to the rights of the accused to be tried without delay". However, the Majority failed to make any findings on how the right to expeditious proceedings is impacted – positively or negatively – by admitting the prior recorded testimony in question.

101. A proper consideration of the impact the admission of the prior statements will have on proceedings reveals that it will not expedite proceedings but make them longer and more complicated, a fact recognised in the Partly Concurring Opinion.[177] As repeatedly noted in this brief, the material at issue is not uncontroversial, nor can it be described as contextual or background. Therefore, it is not the type of material which might easily be admitted on paper without significant challenge to increase the expeditiousness of the trial. Instead, the evidence is extensive and significant. It relates to [REDACTED] "linkage" witnesses, goes to the proof of the acts and conduct of the accused and is considered important to the Prosecution's case.[178]

102. In addition, if, *arguendo*, "testimony" can extend to unsworn statements and recanting witnesses can properly be considered to have "failed to give evidence",

[176] *E.g.*, ICC-01/04-01/06-773 OA5, para. 20.
[177] Partly Concurring Opinion, para. 18.
[178] The material of only [REDACTED] Rule 68 Witnesses was admitted under Rule 68(2)(d).

then proceedings are undoubtedly lengthened and rendered more complex because the Chamber is being "asked to choose between two statements [one under oath and the other unsworn] from the same witness, as opposed to other forms of hearsay in which only one account from the declarant is tendered."[179] The experience in *Limaj* is also salutary. Despite the prior inconsistent statements in that case displaying greater indicia of reliability than in the present case because, *inter alia*, they had been video recorded, were prepared with the assistance of interpreters and the witnesses acknowledged in court having given the interviews and generally having been truthful in doing so,[180] in its final judgement the ICTY Trial Chamber stated that the presence of two inconsistent accounts in the record had rendered its function of determining where the truth lies "undoubtedly more complex" and "[a]t times…had to leave the evidence aside altogether."[181] This underlines that the assessment of threshold reliability must be robust and meaningful, taking account of all available factors, in order to expedite proceedings. Such an approach not only assists during final deliberations but ensures that, if a defence case is required, it is circumscribed and not unnecessarily expanded to meet evidence which is intrinsically unreliable.

103. *Second*, while the Majority correctly noted that it might take into account all evidence it considers necessary for the determination of the truth, it gave undue weight to "the Prosecution's submissions that this evidence is important in the context of the case as a whole."[182] No balancing consideration of the prejudice caused to the Defence by the admission of such evidence was noted by the Majority. In view of the nature of the evidence at issue (*i.e.*, unsworn, hearsay, uncorroborated on its material incriminatory points and contradicted by other trial evidence) its importance to the Prosecution should have been identified as a

[179] *R v. B (K.G.)*, [1993] 1 SCR 740, p. 786-787. This authority is persuasive because it concerns developments in Canada regarding the admission of hearsay statements of recanting witnesses which are similar to Rule 68.
[180] *Prosecutor v. Limaj et al*, IT-03-66-T, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, 25 April 2005, paras. 31-34.
[181] *Prosecutor v. Limaj et al*, IT-03-66-T, Judgement, 30 November 2005, para. 14.
[182] Decision, para. 60.

factor weighing against its introduction in the interests of justice, particularly where, as here, the Prosecutor is seeking to admit a [REDACTED] of her case under Rule 68. In view of the difficulties faced by the Defence in challenging hearsay[183] and by the Trial Chamber in assessing its credibility and reliability,[184] Rule 68 is supposed to operate as an extremely limited exception to the principle of orality[185] and not as a mechanism for the admission of its central "linkage" evidence without which it cannot prove its case. In any event, greater caution and balance was required when considering the importance of the evidence to the Prosecution's case as a factor to be considered when assessing the "interests of justice" limb of the test.

104. *Third*, at paragraph 44 of the Decision, the Majority held that "an accused's involvement or lack of involvement in the interference is [a] relevant consideration when deciding whether it is in the interests of justice to introduce [the] prior recorded testimony". However, the Majority failed to accord sufficient weight to this consideration. Notwithstanding "the unproven link between the improper interference and the accused", the Majority found without further explanation that the admission of the material is not "unduly detrimental to the accused".[186] The lack of reasoning on this point, in and of itself, amounts to an error. That said, two points can be discerned. In the first place, the Majority did not find any link between Mr. Ruto and the alleged interference. This fact should have been viewed as militating against admission of the prior statements. To find otherwise effectively penalises Mr. Ruto for the actions of others, including those that may have had a hand in falsely implicating him in the first place. In the second place, the Majority did find that admission would cause "detriment", whether undue or otherwise. Again, and in the absence of any explanation as to why the detriment is not "undue", this factor should have been properly

[183] *Riat (Jaspal)*, *supra*, at 2597.
[184] *E.g.*, the Chamber does not have access to the full range of non-verbal indicators that are indispensable, or at least very helpful, in assessing the reliability and credibility of the witness at the time [REDACTED] was giving the information that the Prosecution now seeks to admit for the truth of its contents.
[185] Partly Concurring Opinion, para. 18.
[186] Decision, paras. 60, 81, 111, 128.

considered as weighing against admission. Indeed, had detriment been properly considered, it is clear that the correct conclusion which would have been reached is that the detriment which will be suffered is considerable. The Defence's concerns regarding the nature, significance and extent of the evidence admitted under Rule 68(2)(d) have been extensively canvassed in this brief and are not rehearsed here but establish detriment and show that the interests of justice weigh against admission.

105. *Fourth*, deferring consideration of "the nature of the evidence", including "if it is direct or hearsay evidence, whether [it] go[es] to the acts and conduct of the accused, and whether the evidence…is corroborated by any other evidence admitted onto the record" until final deliberations was incorrect.[187] It was also an error not to consider at all that on material elements the prior statements are mutually inconsistent and contradicted by other trial evidence. Central to the "interests of justice" limb of Rule 68(2)(d) is the concern that the Chamber has before it all the evidence that it considers necessary for it to be able to discharge its truth finding function. In this regard, it is related to the assessment of the reliability of the evidence.[188] Therefore, all these fundamental and important factors which clearly affect the evidence at issue should have been weighed at the point of admission, particularly given the stated centrality and extent of the evidence and the stakes involved in a criminal trial. Further, all these factors were extensively addressed in the responses prepared by both defence teams to the Application. However, rather than directly engage with these issues, the Majority ignored them and, thus, abused its discretion.

106. The foregoing establishes that the Majority erred in its consideration of the "interests of justice" limb of the Rule 68(2)(d)(i) test. Had it not erred, the prior written statements of [REDACTED] would not have been admitted. The Sixth Ground of Appeal should, therefore, be granted.

[187] Decision, paras. 60, 81, 111, 128.
[188] ICTY Rule 92*quinquies*(B)(ii) provides that the interests of justice include the reliability of the statement or transcript, having regard to the circumstances in which it was made and recorded.

VII. Seventh Ground: Error in Admitting the Statements in their Entirety

107. As demonstrated under the previous grounds of appeal, the unsworn prior written statements of the Rule 68 Witnesses should not have been admitted pursuant to Rules 68(2)(c) and (d). However, if, *arguendo*, this Chamber determines that this material was properly admitted, then the Majority erred by admitting these statements in their entirety.[189] The approach taken in the Partly Concurring Opinion is to be preferred in certain respects.[190] Thus, the admission of the prior statements of all Rule 68 Witnesses save [REDACTED] should be subject to the following limitations:

(a) the prior statements should only be admitted for the truth of their contents to the extent that the Prosecution asked specific questions of the relevant witnesses and received answers (including in relation to documentary and other materials put to the particular witness while on the stand); and

(b) the prior statements should only be admitted for purposes of impeachment to the extent that the Defence asked specific questions of the relevant witnesses and received answers (including in relation to documentary and other materials put to the particular witness while on the stand).

108. In admitting the prior statements in their entirety, the Majority failed to give proper consideration to the interests of the accused.[191] As recognised in the Partly Concurring Opinion, "[t]he Prosecution had these witnesses on the stand for lengthy periods."[192] Therefore, the Prosecution had not only the obligation, but "the fair opportunity to have the witnesses specifically address their minds, under oath, to aspects of their out-of-court statements that were of particular

[189] Decision, p. 60.
[190] Partly Concurring Opinion, para. 48.
[191] Partly Concurring Opinion, para. 45.
[192] Partly Concurring Opinion, para. 48.

interest to the Prosecution."[193] This recognition is important because it is clear that, despite having the time, opportunity and anticipation of a future Rule 68 application,[194] the Prosecution either dealt with some parts of the witnesses' original accounts cursorily[195] or not at all[196] while the witnesses were on the stand.[197] More fundamentally, at no point did the Prosecution seek to demonstrate the veracity of the witnesses' original accounts.[198]

109. The Majority's failure to impose limitations results in an evidentiary windfall being given to the Prosecution *via* the admission of the prior statements in their entirety when the Prosecution had the opportunity to explore in-depth with the witness all the areas of particular interest to it but did not do so. This was a deliberate tactical choice. By avoiding canvassing the original accounts in-depth with each witness, the Prosecution sought to preserve these accounts in their pre-prepared form for eventual admission *in toto* under Rule 68. It appears the Prosecution's aim was to minimise the witnesses' opportunities to lend any substance to their claims that their original accounts were false.

110. While the admission of the prior statements should be the subject of limitations, the Defence submits that, in order to properly reflect the differing roles of the Prosecution and the Defence, the limitations should be more circumscribed than those outlined in the Partly Concurring Opinion. In the circumstances of the present case, the purpose of the Prosecution's questioning of the Rule 68 Witnesses was three-fold, namely to discharge its burden of proof, to anticipate an application to declare the witness hostile and to lay the ground for a Rule 68 application. In contrast, Defence questioning was aimed at showing that the original account was false. It was not undertaken so that it could be used as a

[193] Partly Concurring Opinion, para. 48.
[194] T-87, 35:14-24; T-123, 71:23-72:3.
[195] [REDACTED]
[196] [REDACTED]
[197] The Defence notes that the level of detail the Prosecution chose to analyse a statement with a witness while on the stand is a different issue to the Majority's consideration of "[w]hether reasonable efforts have been made to secure all material facts known to the witness". *See* Decision, paras. 49-50, 73-74, 103, 122.
[198] The Defence repeatedly asked the Prosecution to address the veracity of the original accounts. [REDACTED]

backdoor device for the Prosecution to profit by portions of the statement which the Prosecution had deliberately chosen either not to address or to address only in broad terms being later admitted for truth.[199]

111. The Defence observes that the admission of prior recorded testimony in part under Rule 68 is permitted as is evidenced by Rules 68(2)(c)(ii) and (d)(iv), both of which refer to the introduction of "part of it".

112. In conclusion, the Majority erred by admitting the prior written statements of [REDACTED] in their entirety. Had it not erred, these statements would only have been admitted to the extent set out in paragraph 107 above. Accordingly, the Seventh Ground of Appeal should be granted.

REQUEST FOR AN ORAL HEARING

113. As noted in the Introduction, the Decision is the first judicial consideration of amended Rule 68. Due to the importance and novelty of the issue combined with the significance of the evidence at issue to the Prosecution's case, the Defence respectfully submits that an oral hearing would be beneficial to assist the Appeals Chamber in resolving the seven grounds of appeal.

CLASSIFICATION

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

[199] [REDACTED]

CONCLUSION

115. As argued above, the Defence submits that a series of fundamental errors were made in the Decision which, either individually or cumulatively, materially affect the Decision. Accordingly, the Defence respectfully requests the Appeals Chamber to:

a. grant the request for an oral hearing; and

b. reverse the Decision admitting the prior statements and related material of the [REDACTED] Rule 68 Witnesses to the extent following from the particular ground(s) of appeal sustained by the Appeals Chamber and, where relevant, remand the matter to the Trial Chamber to determine with appropriate directions.

Respectfully submitted,

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Lead Counsel for Mr. William Samoei Ruto

Dated this 6th Day of October 2015
At The Hague, Netherlands

Word Count: 17,299[200]

[200] It is certified that this brief contains the number of words specified and complies in all respects with the requirements of Regulation 36 of the Regulations of the Court. This statement (55 words), not itself included in the word count, follows the Appeals Chamber's direction to "all parties" appearing before it: ICC-01/11-01/11-565 OA6, para. 32.