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

Date: 12 February 2016

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 document

Judgment

**on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against
the decision of Trial Chamber V(A) of 19 August 2015 entitled “Decision on
Prosecution Request for Admission of Prior Recorded Testimony”**

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Ms Helen Brady

Counsel for Mr William Samoei Ruto
Mr Karim Khan
Mr David Hooper

Legal Representative of Victims
Mr Wilfred Nderitu

Counsel for Mr Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

The Office of Public Counsel for Victims
Ms Paolina Massidda

Amicus Curiae
Prof. Charles Chernor Jalloh on behalf of the
African Union Commission

REGISTRY

Registrar
Mr Herman von Hebel

The Appeals Chamber of the International Criminal Court,

In the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) dated 19 August 2015 and registered on 28 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony” (ICC-01/09-01/11-1938-Corr-Red2),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1. The request of Mr William Samoei Ruto for an oral hearing is rejected.
2. The “Sang Defence Submission in addition to *Appeal against the decision of Trial Chamber V (A) of 19 August 2015 entitled ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’*” is rejected.
3. The “Decision on Prosecution Request for Admission of Prior Recorded Testimony” is reversed to the extent that prior recorded testimony was admitted under amended rule 68 of the Rules for the truth of its contents.

REASONS

I. KEY FINDINGS

1. Article 24 (2) of the Statute is not applicable to amendments to the Rules of Procedure and Evidence, which are governed by the specific provisions of article 51 (4) of the Statute.
2. ‘Detriment’ within the meaning of article 51 (4) of the Statute is disadvantage, loss, damage or harm to the accused. Detriment in the sense of article 51 (4) of the Statute needs to meet a certain threshold, which is that the overall position of the accused in the proceedings be negatively affected by the disadvantage.

3. Where the specific circumstances of a case fall within the parameters set out in rule 68 of the Rules of Procedure and Evidence, the legal requirements of that provision must be observed for the prior recorded testimony to be admissible. If those requirements are not met, recourse to article 69 (2) and (4) of the Statute is not permissible.

II. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

4. On 29 April 2015, the Prosecutor requested Trial Chamber V(A) (“Trial Chamber”) to admit prior recorded testimony for the truth of its contents under rule 68 of the Rules of Procedure and Evidence (“Rules”), or alternatively under article 69 (2) and (4) of the Statute¹ (“Prosecutor’s Request to Admit Prior Recorded Testimony into Evidence”).

5. On 12 June 2015, Mr William Samoei Ruto (“Mr Ruto”) and Mr Joshua Arap Sang (“Mr Sang”) filed their responses to the Prosecutor’s Request to Admit Prior Recorded Testimony into Evidence, opposing it.²

6. On 25 June 2015, the Trial Chamber heard further oral submissions from the parties and participants on issues related to the Prosecutor’s Request to Admit Prior Recorded Testimony into Evidence.³

7. On 19 August 2015, the Trial Chamber rendered its “Decision on Prosecution Request for Admission of Prior Recorded Testimony”⁴ (“Impugned Decision”), in

¹ ICC-01/09-01/11-1866-Conf; a public redacted version, entitled “Public redacted version of ‘Prosecution’s request for the admission of prior recorded testimony of [REDACTED] witnesses’”, was registered on 21 May 2015 ([ICC-01/09-01/11-1866-Red](#)), paras 1, 239.

² For Mr Ruto: 23 June 2015, ICC-01/09-01/11-1908-Conf-Corr; a public redacted version, entitled “Public redacted version of ‘Corrigendum of Ruto Defence response to the ‘Prosecution’s request for the admission of prior recorded testimony of [REDACTED] witnesses’””, was registered on the same date ([ICC-01/09-01/11-1908-Corr-Red](#)). For Mr Sang: 22 June 2015, ICC-01/09-01/11-1911-Conf-Corr; a public redacted version, entitled “Public Redacted Version of Corrigendum to Sang Defence Response to Prosecution’s Request for the Admission of Prior Recorded Testimony of [Redacted] Witnesses, filed on 12 June 2015”, dated 30 June 2015 was registered on 2 July 2015 ([ICC-01/09-01/11-1911-Corr-Red](#)).

³ Transcript of 25 June 2015, ICC-01/09-01/11-T-207-CONF-ENG (ET).

⁴ A corrigendum to the confidential version was registered on 28 August 2015 (ICC-01/09-01/11-1938-Conf-Corr); a second corrigendum to the public redacted version was registered on the same date ([ICC-01/09-01/11-1938-Corr-Red2](#)); a corrigendum to the “Partly Concurring Opinion of Judge Eboe-Osuji on the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’” was registered

which it granted in part the Prosecutor's Request to Admit Prior Recorded Testimony into Evidence, by admitting into evidence prior recorded testimony under rule 68 (2) (c) and (d) of the Rules, along with accompanying annexes.⁵ Some of the prior recorded testimony had previously been admitted for purposes other than for the truth of its contents.⁶

8. On 25 August 2015, Mr Ruto and Mr Sang requested leave to appeal the Impugned Decision.⁷ The Prosecutor responded to their requests on 31 August 2015.⁸

9. On 10 September 2015, the Trial Chamber granted Mr Ruto and Mr Sang leave to appeal the Impugned Decision on the following seven issues:

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

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

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

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

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

on 28 August 2015 (ICC-01/09-01/11-1938-Conf-Anx-Corr); a second corrigendum to the public redacted version was registered on the same date ([ICC-01/09-01/11-1938-Anx-Corr-Red2](#)).

⁵ [Impugned Decision](#), pp. 54-55.

⁶ See [Impugned Decision](#), paras 45, 68, 98.

⁷ For Mr Sang: "Sang Defence Request for Leave to Appeal the Decision on Prosecution Request for the Admission of Prior Recorded Testimony", ICC-01/09-01/11-1939-Conf; a public redacted version was registered on the same date ([ICC-01/09-01/11-1939-Red](#)). For Mr Ruto: "Ruto Defence application for leave to appeal the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'", ICC-01/09-01/11-1940-Conf; a public redacted version was registered on 26 August 2015 ([ICC-01/09-01/11-1940-Red](#)).

⁸ "Prosecution's Consolidated Response to Ruto Defence's and Sang Defence's applications for leave to appeal the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony,' (ICC-01/09-01/11-1938-Conf, 19 August 2015)", ICC-01/09-01/11-1945-Conf.

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

vii) Whether the Impugned Decision erred in its consideration of ‘interests of justice’ pursuant to Rule 68(2)(d) of the Rules (‘Seventh Issue’).⁹

B. Proceedings before the Appeals Chamber

10. On 5 October 2015, having been granted a time and page limit extension,¹⁰ Mr Ruto and Mr Sang filed their respective documents in support of their appeals.¹¹

11. On 12 October 2015, the Appeals Chamber granted leave to the African Union Commission (“African Union”) to submit *amicus curiae* observations on the first issue in relation to which leave to appeal was granted,¹² which it did on 19 October 2015.¹³ The Prosecutor and Mr Sang submitted their respective responses on 26 October 2015.¹⁴

⁹ “Decision on the Defence’s Applications for Leave to Appeal the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’”, registered on 11 September 2015 (ICC-01/09-01/11-1953-Conf-Corr), para. 20; a corrigendum to the public redacted version was registered on the same date ([ICC-01/09-01/11-1953-Red-Corr](#)).

¹⁰ “Decision on the requests for time and page extension”, 18 September 2015, [ICC-01/09-01/11-1971](#) (OA 10) (“Decision on Page and Time Extension”). See also “Ruto Defence request for extension of page and time limits”, 11 September 2015, ICC-01/09-01/11-1956-Conf (OA 10); a public redacted version was registered on the same date ([ICC-01/09-01/11-1956-Red](#) (OA 10)); “Addendum to ‘Ruto Defence request for extension of page and time limits’”, 11 September 2015, [ICC-01/09-01/11-1957](#) (OA 10); “Sang Defence Request to Join the *Addendum to the ‘Ruto Defence Request for Extension of Page and Time Limits’*”, 11 September 2015, [ICC-01/09-01/11-1958](#) (OA 10); “Prosecution’s Response to joint Defence request for extension of page and time limits”, 14 September 2015, [ICC-01/09-01/11-1961](#) (OA 10).

¹¹ For Mr Ruto: “Ruto Defence appeal against the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’”, ICC-01/09-01/11-1981-Conf (OA 10) (“Mr Ruto’s Document in Support of the Appeal”); a public redacted version was registered on 6 October 2015 ([ICC-01/09-01/11-1981-Red](#) (OA 10)). For Mr Sang: “Sang Defence Appeal against the decision of Trial Chamber V (A) of 19 August 2015 entitled ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’”, ICC-01/09-01/11-1982-Conf (OA 10) (“Mr Sang’s Document in Support of the Appeal”); a public redacted version was registered on 13 October 2015 ([ICC-01/09-01/11-1982-Red](#) (OA 10)).

¹² “Decision on applications for leave to submit *amicus curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence”, [ICC-01/09-01/11-1987](#) (OA 10) (“*Amicus Curiae* Decision”). See also “African Union Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence on the Rule 68 Amendments at the Twelfth Session of the ICC Assembly of States Parties”, dated 5 October 2015 and registered on 7 October 2015, [ICC-01/09-01/11-1983-Anx](#) (OA 10).

¹³ “The African Union’s *Amicus Curiae* Observations on the Rule 68 Amendments at the Twelfth Session of the Assembly of States Parties”, [ICC-01/09-01/11-1988](#) (OA 10) (“African Union’s Observations”).

¹⁴ For the Prosecutor: “Prosecution’s response to the African Union Commission’s *amicus curiae* submissions pursuant to rule 103”, [ICC-01/09-01/11-1992](#) (OA 10) (“Prosecutor’s Response to African Union’s Observations”). For Mr Sang: “Sang Defence Response to the African Union’s *Amicus Curiae*

12. On 26 October 2015, the Prosecutor¹⁵ and the Common Legal Representative for Victims¹⁶ (“Victims”) filed their respective consolidated responses to the appeals of Mr Ruto and Mr Sang against the Impugned Decision.

13. On 17 December 2015, Mr Sang filed further submissions in support of his appeal¹⁷ (“Mr Sang’s Further Submissions”), to which the Prosecutor responded on 4 January 2016.¹⁸

III. MERITS

A. Preliminary Issues

1. *Mr Ruto’s request for an oral hearing*

14. Mr Ruto submits that “[d]ue to the importance and novelty of the issue” on appeal and the significance of the material admitted into evidence, an oral hearing “would be beneficial to assist the Appeals Chamber in resolving” the appeal.¹⁹ The Prosecutor responds, *inter alia*, that the matters at issue in this appeal are not “so important or novel as to require an oral hearing”.²⁰

15. Rule 156 (3) of the Rules provides that “[t]he appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing”.

Observations on the Rule 68 Amendments at the Twelfth Session of the Assembly of States Parties”, [ICC-01/09-01/11-1993](#) (OA 10) (“Mr Sang’s Response to African Union’s Observations”).

¹⁵ “Prosecution’s Consolidated Response to the Appeals of Mr Ruto and Mr Sang against the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’”, ICC-01/09-01/11-1994-Conf (OA 10) (“Prosecutor’s Response to the Documents in Support of the Appeal”); a public redacted version was registered on 3 November 2015 ([ICC-01/09-01/11-1994-Red](#) (OA 10)).

¹⁶ “Response of the Common Legal Representative for Victims to the Appeals by the Ruto Defence and Sang Defence Against the ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’”, [ICC-01/09-01/11-1995](#) (OA 10) (“Victims’ Response to the Documents in Support of the Appeal”); the document was originally filed confidentially but was reclassified as public pursuant to “Order for reclassification of a document”, 8 February 2016, [ICC-01/09-01/11-2023](#) (OA 10).

¹⁷ “Sang Defence Submission in addition to Appeal against the decision of Trial Chamber V (A) of 19 August 2015 entitled ‘Decision on Prosecution Request for Admission of Prior Recorded Testimony’”, [ICC-01/09-01/11-2006](#) (OA 10).

¹⁸ “Prosecution’s Response to the ‘Sang Defence’s Submission in addition to Appeal against the decision of Trial Chamber V (A) of 19 August entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony””, [ICC-01/09-01/11-2008](#) (OA 10) (“Prosecutor’s Response to Mr Sang’s Further Submissions”).

¹⁹ [Mr Ruto’s Document in Support of the Appeal](#), para. 113.

²⁰ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 239.

16. The Appeals Chamber has held that it is vested with discretion to convene a hearing, provided that the parties present “cogent reasons” as to why an oral hearing should be held.²¹

17. The Appeals Chamber recalls that the novelty and the complexity of the issues on appeal justified an extension of the page and time limits for the filing of the documents in support of the appeal and responses thereto.²² In light of the extensive submissions that have been filed, which the Appeals Chamber considers sufficient for its final determination, it is unnecessary to convene an oral hearing in this appeal. Mr Ruto’s request is therefore rejected.

2. *Mr Sang’s Further Submissions*

18. Mr Sang contends that a purported resolution adopted by the Assembly of States Parties (“ASP”) is relevant to the determination of matters raised in this appeal.²³ The Prosecutor responds that Mr Sang has failed to identify the procedural and legal bases for his submissions and therefore his request should be rejected.²⁴

19. At the outset, the Appeals Chamber notes that Mr Sang did not seek leave from the Appeals Chamber to file his Further Submissions, nor did he identify the legal basis for his filing. In any event, the Appeals Chamber observes that, contrary to Mr Sang’s assertion, the document to which Mr Sang refers is not a resolution, but is part of the Official Records of the proceedings of the Fourteenth Session of the ASP and pertains to, *inter alia*, a debate regarding an issue placed on the agenda, namely the “Review of the application and implementation of amendments to the Rules [...] introduced at the 12th Assembly”.²⁵ Furthermore, even assuming, for present

²¹ *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled ‘Decision on the admissibility of the case against Saif Al-Islam Gaddafi’”, 21 May 2014, ICC-01/11-01/11-547-Conf (OA 4); a public redacted version was registered on the same date ([ICC-01/11-01/11-547-Red](#) (OA 4)), para. 22.

²² [Decision on Page and Time Extension](#), paras 6, 8.

²³ [Mr Sang’s Further Submissions](#), para. 7. See also [Annex A](#) to Mr Sang’s Further Submissions.

²⁴ [Prosecutor’s Response to Mr Sang’s Further Submissions](#), paras 2-3.

²⁵ See Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourteenth Session, The Hague, 18-26 November 2015, Official Records, Volume I (Advance version), [ICC-ASP-14/20](#) (“ASP 14th Session Official Records”), pp. 12-13, para. 61: “Following the debate on the supplementary item ‘Review of the Application and Implementation of Amendments to the Rules of Procedure and Evidence introduced at the 12th Assembly’, the Assembly recalled its resolution [ICC-ASP/12/Res.7](#), dated 27 November 2013, which amended rule 68 of the Rules of Procedure and Evidence, which entered into force on the above date, and consistent with the Rome Statute reaffirmed

purposes, that the aforementioned document were to be considered as a resolution of the ASP, no amendment to the resolution of 27 November 2013 adopting the amendment to rule 68 of the Rules²⁶ (“ASP Resolution of November 2013”) resulted therefrom, nor has any amendment been made to the text of amended rule 68 itself. In these circumstances, the Appeals Chamber finds the text referred to by Mr Sang to be irrelevant for the determination of this appeal. Accordingly, Mr Sang’s request is rejected.

B. Standard of review

20. With respect to an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber’s legal interpretation, but will arrive at its own conclusion as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.²⁷ This standard of review will guide the analysis of the Appeals Chamber.

C. First ground of appeal

21. Mr Sang and the African Union claim that Court officials gave alleged undertakings and certain States Parties stated that amended rule 68 of the Rules would not be applied to the present case.²⁸ Moreover, Mr Ruto and Mr Sang submit that the Trial Chamber erred in finding that the application of amended rule 68 of the Rules did not offend articles 24 (2) and 51 (4) of the Statute.²⁹

its understanding that the amended rule 68 shall not be applied retroactively”. See also [ASP 14th Session Official Records](#), pp. 12-13, paras 60-63.

²⁶ Resolution [ICC-ASP/12/Res.7](#).

²⁷ *Prosecutor v. Uhuru Muigai Kenyatta*, “Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’”, 19 August 2015, [ICC-01/09-02/11-1032 \(OA 5\)](#), para. 23; *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction”, 1 December 2014, ICC-01/04-01/06-3121-Conf (A 5); a public redacted version was registered on the same date ([ICC-01/04-01/06-3121-Red \(A 5\)](#)), para. 18; *Prosecutor v. Simone Gbagbo*, “Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled ‘Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo’”, 27 May 2015, ICC-02/11-01/12-75-Conf (OA); a public redacted version was registered on the same date ([ICC-02/11-01/12-75-Red \(OA\)](#)), para. 40.

²⁸ [Mr Sang’s Document in Support of the Appeal](#), paras 14-27; [African Union’s Observations](#), paras 52-63.

²⁹ [Mr Ruto’s Document in Support of the Appeal](#), paras 7-42; [Mr Sang’s Document in Support of the Appeal](#), paras 28-52.

22. The Appeals Chamber will first address the arguments regarding the alleged undertakings and statements made by certain States Parties. It will then turn to the remaining arguments raised by Mr Ruto and Mr Sang.

1. Alleged undertakings given by Court officials and statements made by some States Parties

(a) Relevant part of the Impugned Decision

23. In addressing the Prosecutor’s Request to Admit Prior Recorded Testimony into Evidence, the Trial Chamber examined the question of whether the ASP barred the application of rule 68 of the Rules to the instant case.³⁰ In this regard, the Trial Chamber noted that neither the text of amended rule 68 of the Rules nor the ASP Resolution of November 2013 contained any express time limitations as to when the amended rule would apply.³¹ The Trial Chamber found that the only conclusion to be drawn from the language of the ASP Resolution of November 2013 was that the amended rule “may apply in this case subject to a consideration of Article 51(4) of the Statute”.³² It concluded that article 51 (4) of the Statute would only bar the application of amended rule 68 of the Rules “if it applied ‘retroactively to the detriment of the person who is being prosecuted’”.³³

(b) Submissions of the parties and participants

(i) Mr Sang’s submissions

24. Mr Sang argues that the Trial Chamber failed to take into consideration that the amendment to rule 68 of the Rules was adopted by the ASP with the undertaking that it would not apply to pending cases in the situation in the Republic of Kenya (“Kenya”).³⁴ Mr Sang contends that a statement made by Kenya before the ASP “is highly indicative of the existence of an assurance made to [Kenya], and known to other States, by an officer of the Court or the Prosecution” that amended rule 68 of the Rules would not be applied to the instant case.³⁵ Mr Sang also points in this regard to the emphasis placed by the ASP upon the principle of non-retroactivity and the rights

³⁰ [Impugned Decision](#), paras 14-19.

³¹ [Impugned Decision](#), para. 17.

³² [Impugned Decision](#), para. 19.

³³ [Impugned Decision](#), para. 19.

³⁴ [Mr Sang’s Document in Support of the Appeal](#), paras 14-27.

³⁵ [Mr Sang’s Response to African Union’s Observations](#), para. 3.

of the accused.³⁶ He further contends that the Trial Chamber disregarded the rule of good faith by not addressing Kenya’s assertion that “Senior Officials” of the Court and multiple delegations of States Parties gave an undertaking that amended rule 68 of the Rules would not apply to the pending Kenyan cases.³⁷

(ii) *African Union’s observations*

25. Referring to the negotiations leading up to the amendment of rule 68 of the Rules, the African Union submits that a number of African Union member States “asserted that the Prosecutor or a Court official affirmed that the amended Rule 68 would not apply to on-going proceedings”.³⁸ The African Union argues that unilateral declarations concerning legal or factual situations may create legal obligations on the basis of the principle of good faith.³⁹ The African Union further submits that article 7 (3) of the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*⁴⁰ (“Vienna Convention of 1986”) empowers the Prosecutor to “bind her institution”.⁴¹ In this connection, the African Union avers that the Prosecutor “already exercises powers on the international plane through bilateral agreements with States formalizing rights and obligations with respect to core functions”.⁴² The African Union therefore contends that to hold the Prosecutor to any unilateral commitments made during the negotiating process of amended rule 68 of the Rules “is simply recognition of [her] international character with respect to States”.⁴³

26. The African Union refers to statements made by Kenya, the Federal Republic of Nigeria and the Republic of South Africa at the Plenary Session of the Working

³⁶ [Mr Sang’s Document in Support of the Appeal](#), paras 14-16.

³⁷ [Mr Sang’s Document in Support of the Appeal](#), paras 17-27.

³⁸ [African Union’s Observations](#), para. 53.

³⁹ [African Union’s Observations](#), paras 54-55, referring to the case-law of the International Court of Justice.

⁴⁰ Vienna Convention of 1986, 21 March 1986, Chapter XXIII, United Nations Treaty Collection (Doc. [A/CONF.129/15](#)). Article 7 (3) of the Vienna Convention of 1986 reads: “A person is considered as representing an international organization for the purpose of adopting or authenticating the text of a treaty, or expressing the consent of that organization to be bound by a treaty, if: (a) that person produces appropriate full powers; or (b) it appears from the circumstances that it was the intention of the States and international organizations concerned to consider that person as representing the organization for such purposes, in accordance with the rules of the organization, without having to produce full powers”.

⁴¹ [African Union’s Observations](#), para. 56.

⁴² [African Union’s Observations](#), para. 57.

⁴³ [African Union’s Observations](#), para. 57.

Group on Amendments on 27 November 2013 regarding their understanding of the non-retroactive application of amended rule 68 of the Rules.⁴⁴ The African Union contends that the remaining States Parties present neither objected to nor contradicted what had been expressed by these three States Parties.⁴⁵ The African Union avers that these statements may “be considered interpretative declarations” and form part of the “‘context’ [...] to be taken into consideration during interpretation of treaty provisions”.⁴⁶ The African Union finally submits that these States Parties’ statements are consistent with the assurance given by the chairperson of the Working Group on Amendments that “Rule 68 [would] not apply retroactively to disadvantage the accused”.⁴⁷

(iii) Prosecutor’s submissions

27. The Prosecutor avers that she never gave an undertaking to Kenya and that, even if a Court official provided such an undertaking, it would not have any legal effect because it would not impact on the interpretation or application of amended rule 68 of the Rules nor would it have any binding effect on either the Prosecutor or the Court.⁴⁸ She argues that the plain wording of rule 68 of the Rules and article 51 (4) of the Statute is not ambiguous and there is accordingly no need to resort to the drafting history of these provisions.⁴⁹ The Prosecutor avers further that: (i) these undertakings are irrelevant in determining legislative intent and cannot form part of the drafting history;⁵⁰ (ii) the preamble of the ASP Resolution of November 2013 does not show a common intention among States Parties “to impose an unqualified prohibition of retroactivity on amended rule 68”;⁵¹ and (iii) Mr Sang’s reliance on the

⁴⁴ [African Union’s Observations](#), paras 58-61.

⁴⁵ [African Union’s Observations](#), para. 61.

⁴⁶ [African Union’s Observations](#), para. 62.

⁴⁷ [African Union’s Observations](#), para. 63.

⁴⁸ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 24. *See also* [Prosecutor’s Response to African Union’s Observations](#), paras 1, 3-10.

⁴⁹ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 26. *See also* [Prosecutor’s Response to African Union’s Observations](#), para. 13.

⁵⁰ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 28-30. *See also* [Prosecutor’s Response to African Union’s Observations](#), paras 7-8, 13.

⁵¹ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 31, referring to [ASP Resolution of November 2013](#), para. 2.

principle of good faith with regard to interpreting a treaty is “misplaced and unsupported”.⁵²

28. Furthermore, the Prosecutor argues that the Vienna Convention of 1986 does not apply to the Statute which is a treaty between States only, and therefore the jurisprudence referred to by the African Union is “inapposite”.⁵³ Turning to the alleged statements of some States Parties, the Prosecutor avers that they cannot be considered ‘interpretative declarations’ merely because “other members of the ASP did not object to them” and that they are therefore “irrelevant for the interpretation” and application of amended rule 68 of the Rules.⁵⁴ The Prosecutor avers further that the arguments advanced by the African Union in relation to the principles regarding the procedure of reservations and interpretative declarations are inapposite.⁵⁵

(iv) *Victims’ submissions*

29. The Victims argue that the “[ASP] did not grant any rights *in personam* by resolving that amended Rule 68 would not be applied retroactively to the detriment of a person who was being investigated or prosecuted” and therefore the Trial Chamber did not err in dismissing the argument regarding an alleged undertaking that the amended rule would not be applied to the Kenyan cases.⁵⁶ The Victims submit further that, even assuming that such an undertaking was given, it did not form part of the *travaux préparatoires* and would be irrelevant to the interpretation of amended rule 68 of the Rules.⁵⁷

(c) Determination by the Appeals Chamber

30. As a preliminary matter, the Appeals Chamber recalls that, in granting leave to the African Union to submit observations pursuant to rule 103 of the Rules, it referred specifically to the fact that the African Union Assembly of Heads of State and Government had directed the African Union to seek *amicus curiae* standing before the Court “for purposes of placing before [it] all relevant material arising out of the negotiations” of rule 68 of the Rules during the twelfth session of the ASP in

⁵² [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 32-33.

⁵³ [Prosecutor’s Response to African Union’s Observations](#), paras 11-12.

⁵⁴ [Prosecutor’s Response to African Union’s Observations](#), para. 15.

⁵⁵ [Prosecutor’s Response to African Union’s Observations](#), para. 16.

⁵⁶ [Victims’ Response to the Documents in Support of the Appeal](#), paras 32, 34. *See also* para. 35.

⁵⁷ [Victims’ Response to the Documents in Support of the Appeal](#), para. 36.

November 2013.⁵⁸ The Appeals Chamber has therefore had full regard to the African Union's submissions in this connection. Insofar as other arguments advanced by the African Union do not concern the negotiating process leading up to the amendment of rule 68 of the Rules but rather relate broadly to other arguments already raised by the parties, the Appeals Chamber does not deem it necessary to address any such arguments for the purposes of resolving this appeal.

31. In order to address the arguments raised in relation to the negotiating process leading up to the adoption of amended rule 68 of the Rules, the Appeals Chamber deems it necessary to summarise the process by which this provision came into existence.

32. On 24 October 2013, the Working Group on Amendments⁵⁹ submitted a report to the ASP whereby it recommended, *inter alia*, the adoption of the amendment proposal for rule 68 of the Rules.⁶⁰ In its report, the Working Group on Amendments referred to the discussions leading up to the proposed amendment as follows:

[M]any delegates expressed their support for the proposed amendments to Rule 68. Some delegations who originally had concerns expressed appreciation that those concerns had been addressed and that these amendments appeared to help expedite the workings of the Court in addition to providing safeguards for the rights of the accused and without prejudice to Article 68(3) of the Rome Statute.⁶¹

33. The draft resolution attached to the 24 October 2013 report of the Working Group on Amendments read as follows: “[f]urther decides that the following shall replace rule 68 of the Rules of Procedure and Evidence, and *noting* that the rule as amended is without prejudice to article 68(3) of the Rome Statute”.⁶² The

⁵⁸ [Amicus Curiae Decision](#), paras 9, 17.

⁵⁹ This working group was established by the ASP at its eighth session pursuant to resolution ICC-ASP/8/Res.6 “for the purpose of considering [...] amendments to the Rome Statute proposed in accordance with article 121, paragraph 1, of the Statute at its eighth session, as well as any other possible amendments to the Rome Statute and to the Rules of Procedure and Evidence, with a view to identifying amendments to be adopted in accordance with the Rome Statute and the Rules of Procedure of the Assembly of States Parties” (Official Records of the ASP to the Rome Statute of the International Criminal Court, Eighth session, The Hague, 18-26 November 2009 ([ICC-ASP-8/20](#)), Vol. I, part II, Resolution ICC-ASP/8/Res.6), p. 35, para. 4.

⁶⁰ Report of the Working Group on Amendments, 24 October 2013, [ICC-ASP/12/44](#).

⁶¹ Report of the Working Group on Amendments, 24 October 2013, [ICC-ASP/12/44](#), para. 10.

⁶² Annex I to Report of the Working Group on Amendments, 24 October 2013, [ICC-ASP/12/44](#), p. 4, para. 2 (emphasis in original, footnote omitted).

recommendation for the amendment to rule 68 of the Rules was placed on the agenda for the twelfth session of the ASP.⁶³

34. On 31 October 2013, the Working Group on Lessons Learnt submitted a report to the ASP⁶⁴ whereby, *inter alia*, a recommendation to amend rule 68 of the Rules was included.

35. During the twelfth session of the ASP, the chair of the Working Group on Amendments presented an oral report to the ASP recommending, *inter alia*, the amendment of rule 68 of the Rules as follows:

The proposed new rule 68 is aimed at allowing the judges of the Court to reduce the length of Court proceedings and streamline the presentation of evidence by increasing the instances in which prior recorded testimony could be introduced instead of hearing the witness in person, while paying due regard to the principles of fairness and the rights of the accused.⁶⁵

36. The amendment to rule 68 of the Rules was adopted by consensus at the ASP's twelfth session, at the 12th plenary meeting held on 27 November 2013. In introducing the amendment to rule 68 of the Rules, it was stated that

*The Assembly of States Parties [...] Further decides that the following shall replace rule 68 of the Rules of Procedure and Evidence, emphasizing article 51, paragraph 4, of the Rome Statute according to which amendments to the Rules of Procedure and Evidence shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted, with the understanding that the rule as amended is without prejudice to article 67 of the Rome Statute related to the rights of the accused, and to article 68, paragraph 3, of the Rome Statute related to the protection of the victims and witnesses and their participation in the proceedings.*⁶⁶ [Footnote omitted, emphasis in original].

37. For the reasons that follow, the Appeals Chamber is not persuaded by the arguments advanced by Mr Sang and by the African Union.

38. The Appeals Chamber considers that, in determining the issue of whether amended rule 68 of the Rules was applied in violation of an agreement that it would

⁶³ Report of the Working Group on Amendments, 24 October 2013, [ICC-ASP/12/44](#), paras 10-11.

⁶⁴ Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, [ICC-ASP/12/37/Add.1](#), Annex II.A.

⁶⁵ Assembly of States Parties to the Rome Statute of the International Criminal Court, Twelfth Session, The Hague, 20-28 November 2013, Official Records, Volume I, [ICC-ASP/12/20](#), p. 71. *See also* Report of the Working Group on Amendments, 24 October 2013, [ICC-ASP/12/44](#), para. 8.

⁶⁶ [ASP Resolution of November 2013](#), para. 2.

not be applied to the Kenyan cases, regard must be had to the text of that provision. The Appeals Chamber notes that there is nothing in the text of amended rule 68 of the Rules that indicates that it could not apply to a specific case or, more generally, that it could not apply to pending cases.

39. Furthermore, in considering the ASP Resolution of November 2013, the Appeals Chamber observes that its text, just like the text of the rule itself, does not make any reference to amended rule 68 not applying to a specific case or to pending cases more generally. The Appeals Chamber considers that this would have been said expressly within the text of the resolution had that been the States Parties' intention. It notes also that the resolution emphasises article 51 (4) of the Statute and expressly sets out that an amended rule "shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted".⁶⁷ Accordingly, the text of the resolution expressly contemplates that amended rule 68 of the Rules may be applied retroactively, provided it is not to the detriment of the suspect or the accused. The Appeals Chamber finds that the resolution is therefore consistent with article 51 (4) of the Statute.

40. Moreover, the Appeals Chamber notes that no specific evidence has been produced to support the assertion that, during the negotiations leading to the adoption of amended rule 68 of the Rules, an explicit undertaking was given by Court officials to the effect that the amended rule would not apply to the pending Kenyan cases before the Court. In addition, the Appeals Chamber is not persuaded that the available documentary evidence reflects a general intention by the States Parties adopting the provision that it should not apply to specific cases.

41. The Appeals Chamber also observes that, even assuming, for present purposes, that a purported undertaking had been given, the argument raised by the African Union regarding the applicability of article 7 (3) of the Vienna Convention of 1986 is not persuasive. The Appeals Chamber notes article 1 of the Vienna Convention of 1986, which provides that the convention applies to (a) treaties between one or more States and one or more international organizations, and (b) treaties between

⁶⁷ [ASP Resolution of November 2013](#), para. 2.

international organizations.⁶⁸ The Appeals Chamber observes that the Rome Statute is a treaty between *States*, the Court being the object of that treaty reflecting the agreement between the States “to establish an independent permanent International Criminal Court”.⁶⁹ Amendments to the Rules are adopted by the States Parties who, together, make up the Court’s legislative body.⁷⁰ Therefore, the Appeals Chamber finds that the Vienna Convention of 1986 is not applicable to the circumstances of this case.

42. With regard to the alleged statements made by certain States Parties during the negotiation of the amendment of rule 68 of the Rules, the Appeals Chamber notes that the African Union argues that these statements constitute interpretative declarations that “were endorsed by other States Parties, at least implicitly” and that they should therefore be taken into consideration in the interpretation of the relevant treaty provisions.⁷¹ However, even if it were to be accepted that the statements referred to by the African Union constitute interpretative declarations and that they may somehow be relevant to the interpretation of provisions of the Statute, the Appeals Chamber observes that, in any event, no documentary evidence is available that supports the assertion that other States Parties agreed to or otherwise ‘endorsed’ the alleged statements made by these States Parties during the negotiation of the amendment of rule 68 of the Rules. The Appeals Chamber also does not find any other basis that could support the African Union’s argument. In particular, it finds that the silence of the other States Parties that were present cannot be interpreted as an implicit agreement with any such interpretative declarations. The Appeals Chamber notes that this conclusion also appears to be consistent with the *United Nations Guide to Practice on Reservations to Treaties* adopted in 2011,⁷² which states, *inter alia*, that

⁶⁸ The Appeals Chamber also notes that, as of 12 February 2016, the Vienna Convention of 1986 is not yet in force. See United Nations, Treaty Collections, Doc. [A/CONF.129/15](#).

⁶⁹ See ninth paragraph of the Preamble to the Statute (emphasis added).

⁷⁰ See article 51 (2) of the Statute.

⁷¹ [African Union’s Observations](#), paras 62-63.

⁷² *United Nations Guide to Practice on Reservations to Treaties*, adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the United Nations General Assembly as a part of the Commission’s report covering the work of that session ([A/66/10](#), para. 75) (“Guide on Interpretative Declarations”).

“[a]n approval of an interpretative declaration shall not be inferred from the mere silence of a State or an international organization”.⁷³

43. In light of the above, the Appeals Chamber does not find anything in the drafting history of amended rule 68 of the Rules to reveal an error in the conclusion of the Trial Chamber that the amended rule may apply in this case, subject to a consideration of the requirements of article 51 (4) of the Statute.

2. *Whether the application of amended rule 68 of the Rules contravened articles 24 (2) and 51 (4) of the Statute*

(a) Relevant part of the Impugned Decision

44. The Trial Chamber addressed the question of whether the admission into evidence of prior recorded testimony for the truth of its contents⁷⁴ would be a retroactive application to the detriment of the accused.⁷⁵ In this respect, the Trial Chamber noted that article 24 (2) of the Statute, which is included in Part 3 of the Statute entitled “General Principles of Criminal Law”, sets out, along with articles 22 and 23 of the Statute, the principle of legality at the Court.⁷⁶ The Trial Chamber considered that, read together, articles 22, 23 and 24 of the Statute pertain to substantive law.⁷⁷ With regard to the principle of non-retroactivity, the Trial Chamber stated that this principle “is more applicable to matters of substance than to those of procedure” and considered that amended rule 68 of the Rules does not fall under article 24 (2) of the Statute.⁷⁸ In the Trial Chamber’s view, if article 24 (2) of the Statute governed all amendments to the Rules, “Article 51 (4) would be rendered almost entirely redundant”.⁷⁹

⁷³ Article 2.9.9 of the [Guide on Interpretative Declarations](#). See also Guiding Principle 9 of the “*Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto*”, adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the United Nations General Assembly as a part of the Commission’s report covering the work of that session ([A/61/10](#)), referred to in [Prosecutor’s Response to African Union’s Observations](#), para. 16. Guiding Principle 9 reads: “No obligation may result for other States from the unilateral declaration of a State. However, the other State or States concerned may incur obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration”.

⁷⁴ See [Impugned Decision](#), para. 1.

⁷⁵ [Impugned Decision](#), paras 20-27.

⁷⁶ [Impugned Decision](#), para. 22, footnote 29, referring to articles 22, 23 and 24 of the Statute.

⁷⁷ [Impugned Decision](#), para. 22.

⁷⁸ [Impugned Decision](#), para. 22.

⁷⁹ [Impugned Decision](#), para. 22.

45. With respect to article 51 (4) of the Statute, as the Prosecutor’s Request to Admit Prior Recorded Testimony into Evidence was “not seeking to alter anything which the Defence ha[d] previously been granted or been entitled to as a matter of right”, the Trial Chamber considered that the requested relief was not a retroactive application of amended rule 68 of the Rules.⁸⁰

46. The Trial Chamber further considered that even if the requested relief was considered to be a retroactive application of amended rule 68 of the Rules, its application would not be to the detriment of the accused under article 51 (4) of the Statute.⁸¹ It found that the application of the amended rule cannot be considered detrimental to the accused merely because it allows the Prosecutor to seek the admission of incriminatory evidence against the accused.⁸² The Trial Chamber further held that, in determining whether the application of amended rule 68 of the Rules is detrimental, the provision should be read on its face alone, i.e., “in the abstract”, because an assessment of any concrete application of the amended rule “would create uncertainty and double standards across procedural amendments”.⁸³ In that regard, it considered that amended rule 68 of the Rules is neutral in its application as this rule can “be equally taken advantage of by all parties” and therefore its application is not “inherently detrimental to the accused”.⁸⁴

47. Notwithstanding its conclusion that the assessment of detriment should be conducted in the abstract, the Trial Chamber indicated that it would “assess any detriment to the accused in any concrete application of the amended Rule 68” when deciding whether it is in the interests of justice to admit the prior recorded testimony under rule 68 (2) (d) (i) of the Rules.⁸⁵ In this regard, the Trial Chamber found that the admission of prior recorded testimony under that rule was not “unduly detrimental” to Mr Ruto and Mr Sang.⁸⁶ With regard to the admission of prior recorded testimony under rule 68 (2) (c) of the Rules, the Trial Chamber noted the fact that the witness’s prior recorded testimony had not been subject to cross-examination, but considered

⁸⁰ [Impugned Decision](#), para. 23.

⁸¹ [Impugned Decision](#), para. 24.

⁸² [Impugned Decision](#), para. 24.

⁸³ [Impugned Decision](#), para. 24.

⁸⁴ [Impugned Decision](#), para. 25.

⁸⁵ [Impugned Decision](#), para. 27.

⁸⁶ [Impugned Decision](#), paras 60, 81, 111, 128.

that this fact did not prevent its admission into evidence and would be taken into account when deciding on the weight to be attributed to the evidence.⁸⁷

(b) Submissions of the parties and the participants

(i) *Mr Ruto's and Mr Sang's submissions*

48. Mr Ruto and Mr Sang argue that the Trial Chamber erred in finding that article 24 (2) of the Statute is “limited to changes in substantive law” and does not apply to the amendment of rule 68 of the Rules.⁸⁸ Mr Ruto contends that this provision states the general principle of non-retroactivity in criminal law which also relates to changes in procedural law.⁸⁹ Mr Sang avers that the Trial Chamber failed to explain both why article 24 (2) of the Statute is inapplicable to rule 68 of the Rules and when article 24 (2) of the Statute would apply to a rule amendment.⁹⁰ Mr Ruto and Mr Sang argue that, in line with article 21 of the Statute, the term “law” in article 24 (2) of the Statute encompasses the Rules.⁹¹ Referring to an academic commentary, Mr Ruto and Mr Sang aver that article 24 (2) of the Statute equates “to the domestic law rule against *ex post facto* laws [...] which includes changes to the rules of evidence”.⁹² Mr Ruto argues that, in the instant case, these changes that occurred during the course of his trial led to the admission of “less or different testimony”.⁹³

49. Regarding article 51 (4) of the Statute, Mr Ruto and Mr Sang argue that the Trial Chamber erred in finding that this provision would become redundant if article 24 (2) of the Statute covered all amendments to the Rules.⁹⁴ Mr Ruto avers that this finding was based upon the erroneous “assumption that the same value, right or principle cannot simultaneously exist in two separate articles of the Statute”, and that the Trial Chamber failed to interpret articles 24 (2) and 51 (4) of the Statute “in a

⁸⁷ [Impugned Decision](#), para. 145.

⁸⁸ [Mr Ruto's Document in Support of the Appeal](#), paras 9-17; [Mr Sang's Document in Support of the Appeal](#), paras 28-37.

⁸⁹ [Mr Ruto's Document in Support of the Appeal](#), para. 9.

⁹⁰ [Mr Sang's Document in Support of the Appeal](#), paras 28, 32.

⁹¹ [Mr Ruto's Document in Support of the Appeal](#), para. 11; [Mr Sang's Document in Support of the Appeal](#), paras 31-32.

⁹² [Mr Ruto's Document in Support of the Appeal](#), para. 13; [Mr Sang's Document in Support of the Appeal](#), para. 35.

⁹³ [Mr Ruto's Document in Support of the Appeal](#), para. 14.

⁹⁴ [Mr Ruto's Document in Support of the Appeal](#), paras 18-22; [Mr Sang's Document in Support of the Appeal](#), paras 33-34.

harmonious manner”.⁹⁵ Mr Sang submits that article 24 (2) of the Statute, unlike article 51 (4) of the Statute, “does not require the showing of actual detriment or prejudice” and only requires a showing that the new rule is less favourable to the accused than its original version.⁹⁶ In the present case, Mr Sang argues, it is clear that allowing the admission of written evidence under amended rule 68 of the Rules “*in lieu* of oral testimony” was less favourable to him in comparison with the former rule 68 of the Rules.⁹⁷

50. Mr Ruto and Mr Sang submit further that the Trial Chamber erred in finding that neither of the two conditions set out in article 51 (4) of the Statute – retroactive application and ‘to the detriment of the person who is being [...] prosecuted’ – was met.⁹⁸ In relation to the first condition, Mr Ruto submits that the Trial Chamber erred in finding that the application of the amended rule did not “alter anything which the Defence ha[d] previously been granted or been entitled to as a matter of right”.⁹⁹ Mr Ruto submits that a modification in the law that occurs “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”.¹⁰⁰ Mr Sang points out that another Trial Chamber of the Court has already held that the retroactive application of amended rule 68 of the Rules should not occur in pending cases.¹⁰¹ Mr Ruto argues that the retroactive application of an amendment to a rule may occur in the context of on-going proceedings when its effect is “*neutral or beneficial*”, but not when it is detrimental to the person.¹⁰²

51. Mr Ruto avers further that the Trial Chamber failed to consider that the evidence sought for admission by the Prosecutor relates to material pre-dating the

⁹⁵ [Mr Ruto’s Document in Support of the Appeal](#), paras 18-19, referring to [Impugned Decision](#), para. 22.

⁹⁶ [Mr Sang’s Document in Support of the Appeal](#), para. 35.

⁹⁷ [Mr Sang’s Document in Support of the Appeal](#), para. 36.

⁹⁸ [Mr Ruto’s Document in Support of the Appeal](#), paras 23-42; [Mr Sang’s Document in Support of the Appeal](#), paras 38-52.

⁹⁹ [Mr Ruto’s Document in Support of the Appeal](#), para. 24, referring to [Impugned Decision](#), para. 23.

¹⁰⁰ [Mr Ruto’s Document in Support of the Appeal](#), para. 25.

¹⁰¹ [Mr Sang’s Document in Support of the Appeal](#), para. 41, referring to *Prosecutor v. Jean-Pierre Bemba Gombo*, “Public Redacted Version of ‘Decision on the admission into evidence of items deferred in the Chamber’s previous decisions, items related to the testimony of Witness CHM-01 and written statements of witnesses who provided testimony before the Chamber’ of 17 March 2014 (ICC-01/05-01/08-3019-Conf)”, 26 August 2014, [ICC-01/05-01/08-3019-Red](#), footnotes 88, 111.

¹⁰² [Mr Ruto’s Document in Support of the Appeal](#), para. 27 (emphasis in original).

amendment of rule 68 of the Rules on 27 November 2013, as do the alleged acts of interference, save for one witness.¹⁰³ Moreover, Mr Ruto and Mr Sang contend that the Trial Chamber erred in finding that the application of the amendment did not alter their fair trial right to confront.¹⁰⁴ In support of this contention, Mr Ruto avers that the prior statements and related material of one witness were admitted into evidence under amended rule 68 (2) (c) of the Rules even though he “did not have the opportunity to confront and question [the] witness”.¹⁰⁵

52. Mr Ruto and Mr Sang submit that the Trial Chamber erred in finding that amended rule 68 of the Rules should be read in the abstract and that the application of this provision was not detrimental to them.¹⁰⁶ In Mr Ruto’s view, the interests of justice and the fair trial rights of an accused dictate that the analysis of any detriment to an accused should be undertaken on a case-by-case basis.¹⁰⁷

53. Mr Ruto avers that the Trial Chamber erred in its assessment of the detriment to the accused through its consideration of the ‘interests of justice’ requirement under rule 68 (2) (d) (i) of the Rules because, in so doing, ‘detriment’ is relegated “to form part of a discretionary test”.¹⁰⁸ He points out that the Trial Chamber did find ‘detriment’, while holding that the admission of the evidence would not be “unduly detrimental”.¹⁰⁹ According to Mr Ruto, this finding on detriment shows that the application of amended rule 68 of the Rules did contravene article 51 (4) of the Statute.¹¹⁰ In relation to the evidence admitted under rule 68 (2) (c) of the Rules, Mr Ruto argues that the Trial Chamber failed to assess whether the admission of this evidence was detrimental because that provision does not contain an ‘interests of justice’ requirement.¹¹¹

¹⁰³ [Mr Ruto’s Document in Support of the Appeal](#), para. 29.

¹⁰⁴ [Mr Ruto’s Document in Support of the Appeal](#), para. 30; [Mr Sang’s Document in Support of the Appeal](#), paras 38-40.

¹⁰⁵ [Mr Ruto’s Document in Support of the Appeal](#), para. 30.

¹⁰⁶ [Mr Ruto’s Document in Support of the Appeal](#), paras 30-31, 36; [Mr Sang’s Document in Support of the Appeal](#), paras 43-52.

¹⁰⁷ [Mr Ruto’s Document in Support of the Appeal](#), para. 31.

¹⁰⁸ [Mr Ruto’s Document in Support of the Appeal](#), para. 34.

¹⁰⁹ [Mr Ruto’s Document in Support of the Appeal](#), para. 34.

¹¹⁰ [Mr Ruto’s Document in Support of the Appeal](#), para. 34.

¹¹¹ [Mr Ruto’s Document in Support of the Appeal](#), para. 35.

54. According to Mr Ruto and Mr Sang the meaning of detriment implies that any amendment altering the situation of a person to his or her “disadvantage, damage or harm” in an ongoing case contravenes article 51 (4) of the Statute.¹¹² In that regard, Mr Ruto avers that the admission of “a body of incriminatory ‘linkage’ evidence” would be to his detriment as he is now placed in a disadvantageous position compared to that which existed when the trial against him started.¹¹³ Mr Ruto argues that amended rule 68 of the Rules allows for the admission of untested evidence that goes to the acts and conduct of the accused for the truth of its contents in circumstances in which the witnesses recanted the content of that evidence.¹¹⁴ He adds that the admitted evidence was detrimental to him because of the hearsay nature of the evidence.¹¹⁵

55. Mr Sang avers that article 51 (4) of the Statute sets out a “lower standard than showing an adverse effect” on his rights.¹¹⁶ Mr Ruto argues that ‘detriment’ under the Statute should be interpreted more broadly than rule 6 (D) of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) Rules of Procedure and Evidence,¹¹⁷ because article 51 (4) of the Statute refers to ‘the detriment of the person’ rather than to the narrower phraseology of ‘the rights of the accused’ referred to in the ICTY rule.¹¹⁸ Mr Ruto adds that, even if article 51 (4) of the Statute were interpreted narrowly, the admission of the statement of the unavailable witness was detrimental to his right to confront that witness because his hearsay evidence goes to the acts and conduct of the accused and there was no cross-examination of this witness.¹¹⁹ Mr Sang avers that the application of amended rule 68 of the Rules is detrimental since the accused is confronted with additional evidence that affects his

¹¹² [Mr Ruto’s Document in Support of the Appeal](#), para. 37; [Mr Sang’s Document in Support of the Appeal](#), para. 43.

¹¹³ [Mr Ruto’s Document in Support of the Appeal](#), para. 38.

¹¹⁴ [Mr Ruto’s Document in Support of the Appeal](#), para. 38.

¹¹⁵ [Mr Ruto’s Document in Support of the Appeal](#), para. 39.

¹¹⁶ [Mr Sang’s Document in Support of the Appeal](#), para. 43.

¹¹⁷ *Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia*, 11 February 1994, last amended on 8 April 2015 ([IT/32/Rev. 50](#)) (“ICTY Rules of Procedure and Evidence”).

¹¹⁸ [Mr Ruto’s Document in Support of the Appeal](#), para. 40.

¹¹⁹ [Mr Ruto’s Document in Support of the Appeal](#), para. 41.

rights under article 67 of the Statute, *inter alia*, to have adequate time and facilities for the preparation of his defence and to examine the witnesses against him.¹²⁰

56. Finally, Mr Sang argues that neither article 51 (4) of the Statute nor any other provision protects the Prosecutor from changes in the law that are detrimental to her, which shows that “the parties are not equal”.¹²¹ He also notes the importance of the principle of orality, which can only be departed from in exceptional circumstances and when it is not to the detriment of the rights of the accused.¹²²

(ii) *Prosecutor’s submissions*

57. The Prosecutor argues that: (i) article 24 (2) of the Statute only relates to substantive law and does not apply in the present case;¹²³ and (ii) while article 51 (4) of the Statute applies to amended rule 68 of the Rules, its application was not prohibited in this case.¹²⁴

58. With respect to article 24 (2) of the Statute, the Prosecutor argues that the Trial Chamber correctly interpreted and applied this provision in accordance with its ordinary meaning and in its proper context when it found that it “regulates substantive law only”.¹²⁵ She avers that article 24 (2) is part of the “General Principles of Criminal Law” of the Statute which concerns only substantive law and that article 51 (4) of the Statute deals with matters exclusively related to the Rules.¹²⁶ The Prosecutor further submits that: (i) articles 24 (2) and 51 (4) of the Statute are materially different as to their content and wording and establish different standards for their application;¹²⁷ (ii) they are located in different parts of the Statute, which suggests that “they serve different roles”;¹²⁸ (iii) the Trial Chamber did not find that article 24 (2) applied to some rules only, but merely noted that the “*principle* of non-retroactivity more generally applies to substantive law than procedural law”;¹²⁹ and

¹²⁰ [Mr Sang’s Document in Support of the Appeal](#), para. 45.

¹²¹ [Mr Sang’s Document in Support of the Appeal](#), paras 44, 50-51.

¹²² [Mr Sang’s Document in Support of the Appeal](#), paras 46-49.

¹²³ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 5-22.

¹²⁴ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 35-88.

¹²⁵ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 5-7.

¹²⁶ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 8-10.

¹²⁷ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 14-17.

¹²⁸ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 18-19.

¹²⁹ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 20 (emphasis in original).

(iv) the alleged “novelty” or “unique role” of article 24 (2) of the Statute does not support an interpretation that goes “beyond its plain terms”.¹³⁰

59. With regard to article 51 (4) of the Statute, the Prosecutor submits that although it applies to amended rule 68 of the Rules, its use was not prohibited in this case because this rule was not applied retroactively and, even if it was applied retroactively, it was not detrimental to Mr Ruto and Mr Sang.¹³¹

60. Regarding retroactivity, the Prosecutor submits that the Trial Chamber did not err in finding that amended rule 68 of the Rules was not applied retroactively.¹³² She argues that retroactivity “arises only if the application alters a prior existing right, or if the application is dependent on past occurrences or events” and submits that this was not the case in the instant proceedings.¹³³ The Prosecutor contends that even before the amendment, the prior recorded testimony was admissible under articles 64 (9) (a), 69 (2), (3) and (4) of the Statute and rule 63 (2) of the Rules.¹³⁴ The Prosecutor argues that former rule 68 of the Rules did not exclude the admission of evidence under more general rules in circumstances not specified by the former rule.¹³⁵

61. The Prosecutor avers further that, given the challenges that witness interference poses to any court’s administration of justice, even in the absence of amended rule 68 of the Rules, the Trial Chamber would have been required to admit the contested evidence for the proper “determination of the truth, in accordance with article 69(3)”.¹³⁶ She submits that Mr Ruto’s argument about a presumption that his “case will proceed on the basis of the law which applied when the case started” contradicts article 51 (4) of the Statute, which permits retroactivity, provided that it is not

¹³⁰ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 22.

¹³¹ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 35-88.

¹³² [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 39.

¹³³ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 41-42.

¹³⁴ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 43-45.

¹³⁵ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 45-48, referring, *inter alia*, to *Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the prosecution’s application for the admission of the prior recorded statements of two witnesses”, 15 January 2009, [ICC-01/04-01/06-1603](#), para. 15; *Prosecutor v. Thomas Lubanga Dyilo*, “Corrigendum to Redacted Decision on the defence request for the admission of 422 documents”, 8 March 2011, [ICC-01/04-01/06-2595-Red-Corr](#), paras 55-58; ICTY, *Prosecutor v. Slobodan Milošević*, “[Decision on interlocutory appeal on the admissibility of evidence-in-chief in the form of written statements](#)”, 30 September 2003, IT-02-54-AR73.4, paras 9-10; *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, [Oral decision](#), Transcript of 24 August 2011, IT-04-84bis-T, pp. 457-462.

¹³⁶ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 49. *See also* paras 62, 80.

detrimental to the accused.¹³⁷ The Prosecutor submits that there are no “express time limitations” attached to the application of amended rule 68 of the Rules and adds that the prior recorded testimony was disclosed in January 2013 and the accused were therefore on notice of her intention to rely upon this evidence.¹³⁸

62. The Prosecutor submits that, even if amended rule 68 of the Rules was applied retroactively, it was not applied to the detriment of the accused.¹³⁹ She avers that, for the sake of legal certainty and fairness, article 51 (4) of the Statute requires an abstract assessment of detriment.¹⁴⁰ Further, she argues that, even if the Trial Chamber erred in holding that detriment only needs to be assessed in the abstract, this error would not materially affect the Impugned Decision because, through its analysis of the interests of justice, it did consider detriment to the accused’s right to a fair trial.¹⁴¹

63. With respect to the Trial Chamber’s interpretation of detriment, the Prosecutor avers that it applied a correct standard of ‘detriment’ based upon whether the fair trial rights of the accused would be prejudiced rather than a standard based upon mere disadvantage.¹⁴² She argues that the Trial Chamber “correctly and reasonably found” that the application of amended rule 68 was not to the detriment of the “fair trial rights” of the accused.¹⁴³ According to the Prosecutor, the hearsay nature of the evidence, the fact that this evidence goes to the acts and conduct of the accused or the lack of opportunity for cross-examination do not suffice to establish detriment.¹⁴⁴ She argues that the detrimental effect has to be assessed on a case-by-case basis taking all the relevant facts into account and by “applying the ordinary principles under article 69 (4)” of the Statute.¹⁴⁵ Finally, she submits that Mr Ruto and Mr Sang fail to demonstrate “other prejudice to the fairness of the trial”.¹⁴⁶

¹³⁷ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 52.

¹³⁸ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 53-54. *See also* paras 60, 64.

¹³⁹ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 55-57.

¹⁴⁰ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 58.

¹⁴¹ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 63-64.

¹⁴² [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 69-74.

¹⁴³ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 76.

¹⁴⁴ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 78.

¹⁴⁵ [Prosecutor’s Response to the Documents in Support of the Appeal](#), para. 78.

¹⁴⁶ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 82-87.

(iii) *Victims' submissions*

64. The Victims submit that article 24 (2) of the Statute applies only to substantive crimes and not to matters of procedure as this provision is located in the “General Principles of Criminal Law” part of the Statute.¹⁴⁷ They argue that, in light of its location and wording, article 51 (4) of the Statute is the provision applicable to the question of non-retroactivity for the purpose of this appeal.¹⁴⁸

65. The Victims contend further that there is no detriment to the accused on account of the mere introduction of the evidence.¹⁴⁹ They submit that the issue of detriment can only be determined when the Trial Chamber decides upon the weight to attach to that evidence.¹⁵⁰ The Victims argue that the application of amended rule 68 (2) (c) and (d) of the Rules did not affect acts or facts that occurred or rights that accrued before it came into force nor did it create new obligations or impose new duties in respect of the accused.¹⁵¹

(c) Determination by the Appeals Chamber

(i) *Application of article 51 (4) of the Statute*

66. Mr Ruto and Mr Sang argue in essence that the Trial Chamber erred in limiting the scope of article 24 (2) of the Statute to substantive law only and/or by not applying it to amended rule 68, and by finding that the application of article 24 (2) to procedural law would render “almost entirely redundant” article 51 (4) of the Statute.¹⁵² The submissions of Mr Ruto and Mr Sang therefore require the Appeals Chamber to determine whether the Trial Chamber erred in applying article 51 (4) of the Statute, as opposed to article 24 (2), in the circumstances of the present case.

67. Article 51 (4) of the Statute expressly regulates the circumstances in which amendments to the Rules shall not be applied. Its wording, in relevant part, is clear:

¹⁴⁷ [Victims' Response to the Documents in Support of the Appeal](#), paras 3, 5-6.

¹⁴⁸ [Victims' Response to the Documents in Support of the Appeal](#), paras 7-8.

¹⁴⁹ [Victims' Response to the Documents in Support of the Appeal](#), para. 10.

¹⁵⁰ [Victims' Response to the Documents in Support of the Appeal](#), para. 10.

¹⁵¹ [Victims' Response to the Documents in Support of the Appeal](#), paras 27-30.

¹⁵² [Mr Ruto's Document in Support of the Appeal](#), paras 8-22; [Mr Sang's Document in Support of the Appeal](#), paras 28-35.

Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.

68. The Appeals Chamber accordingly considers that article 51 (4) of the Statute is applicable to the circumstances of the present case.

69. This is not contradicted by article 24 (2) of the Statute, which reads:

In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

70. The Appeals Chamber finds that, in principle, article 24 (2) of the Statute concerns substantive law. This is, first, because article 24 of the Statute must be read as a whole, so as to understand the proper context of what is provided for therein. The first paragraph of that provision provides that “[n]o person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute”. As such, it is clear that article 24 of the Statute concerns *conduct* giving rise to criminal responsibility. It follows that the “law” referred to in article 24 (2) of the Statute is the substantive law which relates to such conduct.

71. Second, the Appeals Chamber considers that article 24 (2) of the Statute must be read in its context. Article 22 (which, *inter alia*, prevents a person from being criminally responsible unless the conduct constitutes a crime within the jurisdiction of the Court at the time that it takes place) and article 23 (which permits a person to be punished for his or her conduct only in accordance with the Statute) precede article 24 of the Statute. These provisions deal with applicable principles of substantive law relating to criminal responsibility. In addition, article 24 (2) is contained in Part 3 of the Statute which pertains to general principles of criminal law.¹⁵³

72. The Appeals Chamber further considers that, even assuming that “the law applicable” referred to in article 24 (2) of the Statute could potentially include certain procedural law as well as substantive law, the more specific provisions of article 51 (4) of the Statute apply when considering the application of amendments to the Rules. The Appeals Chamber notes, in this context, that the ASP Resolution of

¹⁵³ In addition to articles 22 and 23, *see* articles 25-33 of the Statute.

November 2013 expressly referred to and emphasised article 51 (4) of the Statute, but made no mention of article 24 (2). The Appeals Chamber further observes that amendments to the Regulations of the Court are governed by regulation 6 (3) of the Regulations of the Court, which is phrased in similar terms to article 51 (4) of the Statute.¹⁵⁴

73. For the above reasons, the Appeals Chamber finds that article 24 (2) of the Statute is not applicable to amendments to the Rules, which are governed by the specific provisions of article 51 (4) of the Statute. Accordingly, the Appeals Chamber finds no error in the Trial Chamber’s conclusion that article 51 (4) of the Statute is the appropriate provision to consider in the circumstances of the present case.

(ii) Whether amended rule 68 of the Rules was applied retroactively to the detriment of the accused

74. Having determined that article 51 (4) of the Statute is applicable in the present circumstances, the Appeals Chamber observes that, pursuant to article 51 (2) and 51 (4), amendments to the Rules shall enter into force upon adoption; however, they shall not be applied retroactively to the detriment of the person that is being investigated or prosecuted.

75. The Appeals Chamber recalls that the Trial Chamber considered that the admission into evidence of prior recorded testimony was not a retroactive application of amended rule 68 of the Rules.¹⁵⁵ In this respect, the Trial Chamber found that the Prosecutor’s Request to Admit Prior Recorded Testimony into Evidence “[was] not seeking to alter anything which the Defence [had] previously been granted or been entitled to as a matter of right”.¹⁵⁶ As regards detriment, the Trial Chamber found that “[t]he application of Rule 68 cannot be considered detrimental to the accused simply because it allows the Prosecution to request the admission of incriminatory evidence against the accused”.¹⁵⁷ The Appeals Chamber also notes that the Trial Chamber made an abstract assessment of detriment, finding that the amended rule was neutral

¹⁵⁴ Regulation 6 (3) of the Regulations of the Court reads: “Amendments to these Regulations shall not be applied retroactively to the detriment of the person to whom article 55, paragraph 2, or article 58 applies, the accused, convicted or acquitted person”.

¹⁵⁵ [Impugned Decision](#), para. 23.

¹⁵⁶ [Impugned Decision](#), para. 23.

¹⁵⁷ [Impugned Decision](#), para. 24.

in its application and therefore was not “inherently detrimental to the accused” because “it is an admissibility rule that can be equally taken advantage of by all parties to the proceedings”.¹⁵⁸ The Appeals Chamber, however, notes that the Trial Chamber proceeded to “assess any detriment to the accused in any concrete application of the amended rule 68” of the Rules and held that “such considerations are pertinent to deciding whether it is in the interests of justice to admit the prior recorded testimony under Rule 68(2)(d)(i) of the Rules”.¹⁵⁹ The Trial Chamber referred in this regard to the ASP Resolution of November 2013, which stipulates that the rule as amended is “without prejudice to article 67 of the Rome Statute related to the rights of the accused”.¹⁶⁰ The Trial Chamber ultimately admitted prior recorded testimony for the truth of its contents under rule 68 (2) (c) and (d) of the Rules.

76. The Appeals Chamber notes that the Trial Chamber appears to have based its interpretation of ‘detriment’ on prejudice to the rights of the accused. However, there is nothing in article 51 (4) of the Statute to indicate that ‘detriment’ is limited only to such rights. Nor can such a limited understanding of the term be inferred from its ordinary meaning, which involves disadvantage, loss, damage or harm.¹⁶¹

77. The Appeals Chamber further observes that the equivalent provisions at the *ad hoc* tribunals specifically refer to the rights of the accused:

An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case.¹⁶²

An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.¹⁶³

¹⁵⁸ [Impugned Decision](#), para. 25.

¹⁵⁹ [Impugned Decision](#), para. 27.

¹⁶⁰ [Impugned Decision](#), footnote 35, referring to [ASP Resolution of November 2013](#), para. 2.

¹⁶¹ “Loss or damage done or caused to, or sustained by, any person or thing” (*Oxford English Dictionary*, accessed at <http://www.oed.com/view/Entry/51330?rskey=I4EW9O&result=1#eid>); “the state of being harmed or damaged” (C. Soanes, A. Stevenson (eds), *Concise Oxford English Dictionary* (Oxford University Press, 2004), p. 391); “disadvantage or damage; harm; loss” (*Collins Dictionary*, accessed at <http://www.collinsdictionary.com/dictionary/english/detriment>).

¹⁶² Rule 6 (D) of the [ICTY Rules of Procedure and Evidence](#).

¹⁶³ Rule 6 (C) of the [Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda](#), 29 June 1995, last amended on 13 May 2015.

In this regard, the Appeals Chamber notes that the text of article 51 (4) of the Statute differs from that applicable at the *ad hoc* tribunals, notably by not containing the term “rights”.

78. On that basis, the Appeals Chamber considers that the term ‘detriment’ should be interpreted broadly and not be limited to prejudice to the rights of the person who is being prosecuted. The Appeals Chamber notes that article 51 (4) of the Statute concerns amendments to the Rules, which relate to proceedings before the Court, including the admission of evidence. The Appeals Chamber therefore finds that ‘detriment’ within the meaning of article 51 (4) of the Statute is disadvantage, loss, damage or harm to the accused including, but not limited to, the rights of that person. In that regard, the Appeals Chamber stipulates that it is not any disadvantage caused by the amendment of a rule that is sufficient for a finding of detriment under article 51 (4) of the Statute. Detriment in the sense of article 51 (4) of the Statute needs to meet a certain threshold, which is that the overall position of the accused in the proceedings be negatively affected by the disadvantage.

79. In order to determine whether a procedural rule has been applied retroactively to the detriment of the accused, it is necessary to determine the point in time at which the procedural regime governing the proceedings became applicable to the parties, and in particular to the accused.

80. The Appeals Chamber considers that, at the commencement of the trial, there was a clear procedural regime with respect to the introduction of prior recorded testimony on which the accused could rely. The Appeals Chamber notes in this regard that, usually prior to the commencement of the evidentiary hearing, the Trial Chamber renders decisions on the conduct of proceedings.¹⁶⁴ The Appeals Chamber further notes that, usually before the hearing, the Prosecutor provides the accused with the names of witnesses that the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses, in accordance with rule 76 (1) of the Rules. The rules applicable to the introduction of the testimony of these witnesses are then part of the above-mentioned procedural regime.

¹⁶⁴ See article 64 (3) (a), (8) (b) of the Statute; rules 134 (1) and 140 of the Rules.

81. For these reasons, the Appeals Chamber finds that, in the case at hand, which involves the application of a rule concerning the introduction of evidence at trial, the date of the start of the trial is the appropriate point at which to determine “retroactivity”. The regime governing the introduction of prior recorded testimony at the commencement of the trial was changed during the course of the trial by reason of the amendment to rule 68 of the Rules.¹⁶⁵ Accordingly, the Appeals Chamber finds that amended rule 68 was applied retroactively in the on-going trial proceedings within the meaning of article 51 (4) of the Statute.

82. Turning to whether the application of the amended rule was detrimental to the accused in the present case, the Appeals Chamber notes at the outset the Prosecutor’s argument that the challenged evidence would have been admissible for the truth of its contents under article 69 (2) and (4) or under article 69 (3) of the Statute even before the amendment to rule 68 of the Rules took effect.¹⁶⁶ If this argument is correct, the application of the amended rule could not have been detrimental to the accused. However, the Appeals Chamber is not persuaded by these arguments for the reasons set out below.

83. The Appeals Chamber notes that article 69 (2) of the Statute reads as follows:

The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 *or in the Rules of Procedure and Evidence*. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, *as well as the introduction of documents or written transcripts*, subject to this Statute and *in accordance with the Rules of Procedure and Evidence*. These measures shall not be prejudicial to or inconsistent with the rights of the accused. [Emphasis added].

¹⁶⁵ The Trial Chamber was seised of the case on 29 March 2012. See “Decision constituting Trial Chamber V and referring to it the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*”, 29 March 2012, [ICC-01/09-01/11-406](#), pp. 3-4. The opening statements were heard on 10 September 2013. See Transcript of 10 September 2013, [ICC-01/09-01/11-T-27-ENG](#) (ET WT), p. 2, lines 20-21, p. 13, line 23 to p. 14, line 4. Rule 68 of the Rules was amended thereafter, i.e. on 27 November 2013. See [ASP Resolution of November 2013](#).

¹⁶⁶ [Prosecutor’s Response to the Documents in Support of the Appeal](#), paras 43-50. The Appeals Chamber notes that the Prosecutor also refers to article 64 (9) (a) of the Statute and rule 63 (2) of the Rules in making this argument. However, the Appeals Chamber does not consider it necessary to address those provisions individually in this context. This is because they neither add anything of substance to the arguments raised by the Prosecutor under article 69 (2), (3) and (4) of the Statute in this regard, nor, as a result, alter the determination of this issue by the Appeals Chamber.

84. In considering this provision, the Appeals Chamber has held that “[t]he direct import of the first sentence [...] is that witnesses must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality.”¹⁶⁷ It has further stated that “[t]he most relevant provision [in respect of “the introduction of documents or written transcripts”] in the Rules of Procedure and Evidence is rule 68”.¹⁶⁸ Accordingly, the Appeals Chamber considers that rule 68 of the Rules is an exception to the principle of orality enshrined in article 69 (2) of the Statute.

85. The Appeals Chamber has further held, in the context of former rule 68 of the Rules, that in deviating from the principle of orality by admitting into evidence prior recorded testimony:

[A] Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally. In the view of the Appeals Chamber, this requires a cautious assessment. The Trial Chamber may, for example, take into account, a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.¹⁶⁹ [Footnotes omitted].

86. The Appeals Chamber notes that rule 68 of the Rules (former and current) sets out certain scenarios in which prior recorded testimony may be admitted into evidence. It follows that, where the specific circumstances of a case fall within the parameters set out in rule 68 of the Rules, the legal requirements of that provision must be observed for the prior recorded testimony to be admissible. If those requirements are not met, recourse to article 69 (2) and (4) of the Statute is not permissible given that such a course of action would render rule 68 of the Rules meaningless and would enable the party seeking the introduction of the evidence to

¹⁶⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’”, 3 May 2011, [ICC-01/05-01/08-1386](#) (OA 6) (“*Bemba OA 6 Judgment*”), para. 76.

¹⁶⁸ *Bemba OA 6 Judgment*, para. 77.

¹⁶⁹ *Bemba OA 6 Judgment*, para. 78.

avoid the stringency of the latter provision.¹⁷⁰ The Prosecutor's arguments in this regard are accordingly rejected.

87. As regards the Prosecutor's further argument that the prior recorded testimony in this case would have been admissible under article 69 (3) of the Statute prior to the amendment of rule 68 of the Rules, the Appeals Chamber notes that, under article 69 (3), the Trial Chamber retains the authority to request the submission of all evidence that it considers necessary for the determination of the truth. In the circumstances of the present case, the Appeals Chamber is not persuaded by the Prosecutor's argument that the Trial Chamber would have admitted such evidence pursuant to article 69 (3) of the Statute.¹⁷¹ This is because the Trial Chamber did not address in the Impugned Decision the issue of whether the evidence could have been admitted under article 69 (3) before the amendment of rule 68, nor was article 69 (3) a part of the relief sought by the Prosecutor in her alternative request for admission.¹⁷² Given that any determination as to whether the evidence would or would not have been admitted under article 69 (3) of the Statute is wholly speculative, the Appeals Chamber will not further consider the Prosecutor's arguments in this regard.

88. It is therefore necessary to assess whether there was detriment in the present case. The Appeals Chamber notes that article 51 (4) of the Statute refers to the *application* of an amendment to the Rules. It follows that the assessment of detriment pursuant to this article involves not only an analysis of the amended law, but also how that law was applied in a particular case.

89. In relation to the present case, the Appeals Chamber notes that Mr Ruto and Mr Sang argued before the Trial Chamber that the application of the amended rule causes detriment to them – and that they continue to do so before the Appeals Chamber. The Appeals Chamber considers that the submissions of Mr Ruto and Mr Sang that they have suffered detriment, while relevant, cannot, without more, be

¹⁷⁰ See, in the ICTY context, Appeals Chamber, *Prosecutor v. Stanislav Galić*, "[Decision on Interlocutory Appeal concerning Rule 92 bis \(C\)](#)", 7 June 2002, IT-98-29-AR73.2, para. 31. See also ICTY, Appeals Chamber, *Prosecutor v. Slobodan Milošević*, "[Decision on Admissibility of Prosecution Investigators Evidence](#)", 30 September 2002, IT-02-54-AR73.2, para. 18.

¹⁷¹ [Prosecutor's Response to the Documents in Support of the Appeal](#), para. 49.

¹⁷² [Prosecutor's Request to Admit Prior Recorded Testimony into Evidence](#), para. 239.

determinative of whether the amended rule was applied in the present case to the detriment of the accused.

90. In this particular case, the Appeals Chamber recalls that the prior recorded testimony of the unavailable witness was admitted pursuant to amended rule 68 (2) (c) of the Rules, which provides for the introduction of such testimony when a witness is not present and is unavailable to testify orally. The Appeals Chamber recalls further that the prior recorded testimony of the other witnesses was introduced pursuant to amended rule 68 (2) (d) of the Rules on the basis that those witnesses were allegedly subjected to interference.

91. The Appeals Chamber notes that the prior recorded testimony admitted into evidence under amended rule 68 in the present case would not have been admissible under former rule 68 of the Rules. Under that former rule, prior recorded testimony could only be admitted either: (i) where the witness was not present, if both parties had had the chance to examine the witness during the recording; or (ii) where the witness was present, if that witness did not object to the submission of the previously recorded testimony and the parties could examine the witness.¹⁷³

92. Accordingly, the Appeals Chamber finds that, in the case at hand, incriminatory¹⁷⁴ evidence was admitted that could not have been introduced in this form under the former rule. Previously, it could only have been admitted by way of oral testimony.

93. Furthermore, the Appeals Chamber considers that the prior recorded testimony was admitted without any proper opportunity for the accused to cross-examine the witnesses. The Appeals Chamber notes that the witnesses whose prior recorded testimony was admitted pursuant to rule 68 (2) (d) of the Rules testified in court.

¹⁷³ **Former rule 68 of the Rules** provided as follows: “When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that: (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or (b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings”.

¹⁷⁴ See [Impugned Decision](#), paras 60, 81, 111, 128.

However, in so doing they recanted the content of their prior recorded testimony. The Appeals Chamber considers that, where such recantation occurs, it cannot be expected that the accused would proceed by eliciting incriminating evidence from the witness in order to be able subsequently to challenge that evidence. This is the case regardless of whether or not they are on notice of a potential application by the Prosecutor under amended rule 68 of the Rules. The Appeals Chamber therefore considers that, even if the accused had an opportunity to question the witnesses because they appeared before the Court, in the absence of the Prosecutor eliciting incriminating evidence from the witnesses in examination-in-chief, such questioning does not amount to a meaningful cross-examination. It follows that evidence was admitted for the truth of its contents in circumstances in which those witnesses denied the allegations made in that evidence and meaningful cross-examination was not possible.

94. In that context, the Appeals Chamber finds that amended rule 68 of the Rules enlarges the number of exceptions to the principle of orality enshrined in article 69 (2) of the Statute. The Appeals Chamber notes the importance of the principle of orality, the specific right to cross-examine witnesses enshrined in article 67 (1) (e) of the Statute, as well as the negative impact that depriving the accused of the opportunity to challenge evidence can have on the fairness of the proceedings.¹⁷⁵

95. In conclusion, the Appeals Chamber finds that the application of the amended rule resulted in (i) additional exceptions to the principle of orality and restrictions on the right to cross-examine witnesses, and (ii) as a consequence, the admission of evidence, not previously admissible in that form under former rule 68 of the Rules or article 69 (2) and (4) of the Statute which could be used against the accused in an article 74 decision. Considering these disadvantages, the Appeals Chamber finds that the application of this rule negatively affected the overall position of Mr Sang and Mr Ruto in the proceedings at hand. Accordingly, the Appeals Chamber holds that the Trial Chamber applied amended rule 68 of the Rules retroactively to the detriment of the accused.

96. In applying amended rule 68 of the Rules, the Appeals Chamber finds that the Trial Chamber committed legal errors in interpreting the notion of detriment too

¹⁷⁵ See [Bemba OA 6 Judgment](#), paras 74-81.

narrowly, in finding that the rule had not been applied retroactively and in finding that this had not been detrimental to the accused. As it would not have been open to the Trial Chamber, for the reasons outlined above, to admit the evidence under former rule 68, the Appeals Chamber considers that the Trial Chamber's errors materially affected the Impugned Decision.

97. In light of the Appeals Chamber's conclusion in respect of the first ground of appeal, the Appeals Chamber need not address the remaining grounds of appeal.

IV. APPROPRIATE RELIEF

98. On an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules). In the present case, for the reasons set out above, it is appropriate to reverse the Impugned Decision to the extent that prior recorded testimony was admitted under amended rule 68 of the Rules for the truth of its contents.

Done in both English and French, the English version being authoritative.



Judge Piotr Hofmański
Presiding Judge

Dated this 12th day of February 2016

At The Hague, The Netherlands