Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/09-01/11**

Date: **26 October 2015**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR
v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Confidential
"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" "

Source: **Wilfred Nderitu, Common Legal Representative for Victims**

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

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INTRODUCTION:

1. The Common Legal Representative for Victims ("the CLR") opposes the Ruto Defence and Sang Defence Appeals[1] against the "Decision on Prosecution Request for Admission of Prior Recorded Testimony"[2]. For convenience, the CLR has responded to the Appeals jointly wherever possible, and also merged issues or grounds arising on the respective Appeals.

2. The CLR classifies this filing as "Confidential" by virtue of the fact that the Appeals have been given a similar classification.

CORE OF THE ARGUMENTS:

3. With regard to the question whether the amended Rule 68 of the Rules of Procedure and Evidence can be applied in this case without offending Articles 24(2) and 51(4) of the Rome Statute the CLR submits, from the outset, that Article 24(2) relates to only substantive crimes under the Rome Statute, and has no applicability to matters of procedure. Firstly in this regard, it will be noted that Part III under which Article 24(2) falls refers to "General Principles of Criminal Law". From the reference to the word "crime" and its derivatives in Part III of the Statute[3], it is clear that the "general principles" bear a correlation to matters of jurisdiction which have been dealt with in Part II of the Statute. Similarly, the word "jurisdiction" in Part II has been used in the sense of the official power to make legal decisions and judgments *in connection with crimes referred to in Articles 5 to 8 of the Statute*, rather than in the sense of the specific power to make decisions on procedural matters arising in the course of determination of criminal responsibility for such crimes.

[1] ICC-01/09-01/11-1981-Conf and ICC-01/09-01/11-1982-Conf respectively
[2] ICC-01/09-01/11-1938-Conf-Anx; ICC-01/09-01/11-1938-Anx-Red ("Partly Concurring Opinion")
[3] All Articles in Part III of the Statute (Articles 22 to 33) except Article 23 use either the word "crime", "criminal" or "criminally". Article 23 uses the words "convicted" and "punished", clearly suggesting that it is also a provision referring to "crime" and, by extension, to substantive rather than procedural law.

4. Secondly, it is to be noted that the heading of Article 24 is itself "Non-retroactivity *ratione personae*", the words *"ratione personae"* referring to jurisdiction over a person. It is important to point out that Article 24(1) of the Statute ousts the jurisdiction of the Court over any person by declining any criminal responsibility in connection with conduct of such a person before the coming into force of the Statute. By contrast, we are in the present circumstances dealing with a situation where the court has already exercised personal jurisdiction over the Appellants in connection with crimes falling within the jurisdiction of the Court. Thus, in seeking to understand the true purport of Article 24(2), we need to understand the said provision within the context of personal jurisdiction in respect of the crimes set out in Articles 5 to 8 of the Statute.

5. It is therefore submitted that when Article 24(2) provides for the application of "the law more favourable" to a person who is being investigated, prosecuted or convicted in case of a change of "the law applicable" to a given case before final judgment, it is making reference to substantive, as opposed to procedural, law. In other words, the phrases "the law more favourable" and "the law applicable" both relate to the substantive law applicable to the crimes, and have no bearing to rules of procedure. It is therefore submitted that the Trial Chamber did not have to look for rhyme or harmony between Article 24(2) and Article 51(4), both of which broadly relate to the principle of non-retroactivity, but which call for a different approach[4] depending on whether the application is in relation to substantive or procedural law.

6. For the above reasons, the CLR submits that Article 24(2) is of little if any utility to answering the question of non-retroactivity in relation to procedural (as opposed to substantive) matters.

[4] The fact that a different approach is to be applied depending on whether the issue is one of substantive or procedural law does not mean that the two approaches are necessarily antithetical to each other; rather, the application of the two Articles is similar in many respects, but not identical.

7. Article 51(4) falls under Part IV of the Statute, which is headed "Composition and Administration of the Court". The necessary inference to be drawn from this heading is that the provision relates to the manner in which judicial functions shall be administered. In other words, the said Article relates to regulation of procedural matters. The regulation of procedural matters is more specifically detailed in the Rules of Procedure and Evidence.

8. Article 51(4) makes direct reference to the Rules of Procedure and evidence by providing that "[t]he Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with" the Statute and that "[a]mendments 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". The amended Rule 68 is, of course, itself part of the Rules of Procedure and Evidence and an "amendment" to the Rules as contemplated by Article 51(4) of the Statute. For this reason, it is submitted that Article 51(4), as opposed to Article 24(2), of the Statute is the provision applicable on the question of non-retroactivity for the purpose of the present Appeal.

9. The question framed by the Trial Chamber, then becomes: can the amended Rule 68 be applied without offending Article 51(4) of the Statute? The CLR answers this question in the affirmative, for the reasons below.

10. Firstly, the CLR submits that the amended Rule 68 does not become applied "to the detriment of the person who is being… prosecuted" merely upon the introduction of the evidence in question. At the stage of introduction of the evidence, the Trial Chamber makes no *determination* in the real sense on the question of possible detriment to the person being prosecuted. The issue of detriment is ultimately decided at the point when

the Trial Chamber determines what weight to attach to evidence introduced pursuant to the amended Rule. Thus, it is premature to challenge the introduction of the evidence before the Chamber has undertaken the question of the application of such evidence. In this regard, it is submitted that the Trial Chamber correctly took the position that (at the stage of introduction of prior recorded testimony into evidence) the amended Rule 68 should be read "in the abstract".[5] By the same token, the question whether there has been a retroactive application of the amended Rule 68 is therefore one to be determined at the time the evidence is weighed and considered by the Trial Chamber.

11. Secondly, the category of "detriment" of which the Trial Chamber is required to take cognizance and therefore refuse to apply the amended Rule 68 retroactively is necessarily limited by the reason for introduction of prior recorded testimony. As argued further below, while there may be disadvantage, damage or injury arising from the retroactive application of the amended Rule 68, a successful challenge to prior recorded testimony on the ground of detriment to a person being investigated or prosecuted can only be made where the reason for introduction of such testimony bears no relation to wrongdoing. Thus, to use the language of Rule 68 (2)(d), "detriment" cannot be invoked where the failure of a witness to attend or to give evidence "has been materially influenced by improper interference, including threats, intimidation, or coercion".

12. Turning now to the question 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, the CLR submits that such statements and transcripts of interviews indeed as "prior recorded testimony". The *travaux préparatoires* also confirm that "prior recorded

[5] See paragraph 24 of the "Decision on the Prosecution Request for admission of Prior Recorded Testimony", ICC-01/09-01/11-1938-Conf+Conf-Anx, dated 19 August 2015.

testimony" was understood to include prior transcripts and written witness statements, taken by the parties or authorities[6].

13. Further, it will be noted that in the "Recommendation on a proposal to amend Rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony" by the Study Group on Governance (Cluster I: Expediting the Criminal Process)[7], the Working Group on Lessons Learnt recognized the fact that in the jurisprudence of the Court, Rule 68 had been understood to apply not only to video and audio recordings or transcripts, but also to "prior written witness statements"[8]. The Working Group nevertheless acknowledged the fact that that interpretation was "not necessarily universally accepted".

14. In addition to the foregoing and despite the non-universality of acceptance as to the extent to which the phrase "prior recorded testimony" may be applied, the CLR submits that there are other reasons for finding that the application of the phrase to include prior written witness statements is sound in law[9]. In this regard, the fact that the heading of Rule 68 is reads "Prior Recorded Testimony" provokes a number of questions. Firstly, why, apart from the heading of the Rule, did its drafter make reference to "previously recorded testimony" and to "prior recorded testimony" in the body of the Rule? And why did the

[6] ICC-ASP/12/37/Add.1, Annex II, A, Study Group on Governance Cluster I: Expediting the Criminal Process Working Group on Lessons Learnt Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), para.13.
See also paras.3, 35: confirming that the intent was to match or exceed the scope of ICTY Rules 92*quater* and *quinquies* that explicitly allow for introduction of written statements or transcripts of evidence.

[7] Annex II.A of ICC-ASP/12/37/Add.1, retrieved from http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-37-Add1-ENG.pdf. See also ICC-01/04-01/06-1603, "Decision on the Prosecution's Application for the Admission of the Prior Recorded Statements of Two Witnesses", made on 15 January 2009.
[8] See paragraph 2 of Annex II.A
[9] The Ruto Defence itself acknowledges that the use of the word "testimony" is not exclusively defined by reference to the presence of an oath or affirmation, *vide.*, paragraph 44 of the "Ruto Defence Appeal Against the "Decision on Prosecution Request for Admission of Prior Recorded Testimony", ICC-01/09-01/11-1981-Conf.

drafter envisage a situation where "other witnesses will give or have given *oral testimony* of similar facts"? Yet still, why does the Rule refer to "a declaration by the testifying person that the contents of the prior recorded testimony are true and correct", rather than categorically demanding an affidavit? And, finally, why did the Rules did not merely use the word "testimony" or, for that matter, "statement", but instead used the words "prior recorded testimony"?

15. To answer the above questions, we must ask ourselves what is the factor or influence that makes the use of all three words- *prior recorded testimony*- necessary. In other words, we must examine the statutory text critically and look for the imperative. This calls for more than merely taking the word "testimony" out of context, but within the context of the preceding words, namely *prior* and *recorded*. In this regard, it is a cardinal rule of construction of rules that a rule should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes. Indeed, the overriding objective of interpreting rules is to put into force statutory purpose. The approach taken by the Appellants of considering "the ordinary meaning" of the word "testimony" without looking at the word in relation to the words "prior recorded" would lead to an absurd result in that the two words would then be rendered superfluous. Such an interpretation without recourse to the purpose behind the Rule is fallacious. As was stated by United States Chief Justice Taney:

> *In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.*[10]

[10] *United States v. Boisdoré's Heirs*, 49 U.S. (8 How.) 113, 122 (1850). This was the opinion of the Court.

16. And in *FCC v. NextWave Personal Communications, Inc.*[11], Justice Breyer stated that "[i]t is dangerous… in any case of interpretive difficulty to rely exclusively upon the literal meaning of a statute's words divorced from consideration of the statute's purpose." Such is the situation here, and it is important to consider the statutory purposes of Rule 68, both in its old form, and as amended. One of the purposes of the Rule, as amended, was to:

> *"…allow the judges of the Court to reduce the length of Court proceedings and streamline evidence presentation 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".*[12]

17. This particular purpose of the amended Rule 68 calls for an examination as to what "instances in which prior recorded testimony could be introduced" were contemplated in connection with the *original* Rule 68. In this regard, it was held by Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo*[13] that:

> *"…there is no finite list of possible criteria that are to be applied, and a decision on a particular disputed piece of evidence will turn on the issues in the case, the context in which the material is to be introduced into the overall scheme of the evidence and a detailed examination of the circumstances of the disputed evidence. There should be no automatic reasons for either admitting or excluding a piece of evidence but instead the court should consider the position overall."*

[11] 537 U.S. 293, 311 (2003)
[12] Paragraph 8, Report of the Working Group on Amendments, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-44-ENG.pdf
[13] ICC-01/04-01/06-1399, at paragraph 29, "Decision on the Admissibility of Four Documents" made on 13 June 2998

18. As alluded to by the Majority of the Trial Chamber in the present case, different Trial Chambers have adopted a similar understanding of the interworking of Article 69 (2) and Rule 68, where they considered 'prior recorded testimony' under Rule 68 to extend to written statements taken in accordance with Rule 111 and 112.[14] Underpinning theses decisions is the implicit understanding that in-court testimony given under Article 69 (1), though the most preferred form of testimony, is one aspect of the broader body of witness testimony.

19. Trial Chamber II, in the case of the *Prosecutor vs. Germain Katanga and Mathieu Ngudjolo Chui*, in their Decision on the Prosecution's Bar Table Motion, appeared to distinguish between in-court testimony and out-of-court statements that could be considered testimony. The Chamber noted:

> *"… that the right to examine, or to have examined, adverse witnesses only applies to testimony. Not every communication of information by an individual is testimony in this sense. Only when a person acts as a witness against the accused does the latter obtain the right to examine, or have examined, that person. Clearly, statements made out of court can equally qualify as testimony. This is apparent from the wording of article 56(l)(a), which refers to a 'unique opportunity to take testimony' and of article 93(l)(b), which expressly mentions the taking of evidence, 'including testimony under oath' in the context of assistance provided by States Parties 'in relation to investigations or prosecutions'. Moreover, a narrow interpretation of the word 'testimony' in article 67(l)(e) would entirely undermine the very right protected by this article and deprive rule 68 of any meaning"*[15]

20. The Chamber in that case attempted to prescribe some criteria by which to establish which out-of-court statements could be considered testimony:

> *"46. The Chamber is of the view that it is not possible to provide an exhaustive definition of what types of out-of-court statements qualify as testimony. Such a determination must be made on a case-by-case basis,*

[14] ICC-01/09-01/11-1938-Conf, para 31
[15] ICC-01/04-01/07-2635, para 44

> *taking into consideration the precise circumstances under which the out-of-court statement was given. The following criteria can, therefore, only serve as guidelines and are not intended to create fixed categories."*
>
> *"47. The first key factor is whether the out-of-court statement was given to a person or body authorised to collect evidence for use in judicial proceedings. The most common example is when a person gives a statement to a representative of the Office of the Prosecutor. However, statements given to other entities acting at the behest of the Court can also qualify as witness testimony. As articles 54(2) and 93(l)(b) make clear, the Prosecutor may rely on international cooperation in conducting his investigations, including for the taking of pre-trial testimony…"*
>
> *"49. The second key factor in determining whether an out-of-court statement qualifies as testimony in the sense of article 67(l)(e) and rule 68 is that the person making the statement understands, when making the statement, that he or she is providing information which may be relied upon in the context of legal proceedings. It is not necessary for the witness to know against whom his or her testimony may be used, or even for the witness to know which particular crime is being investigated or prosecuted. It is important, however, that the statement is formalised in some manner and that the person making the statement asserts that it is truthful and based on personal knowledge…."*[16]

21. As with the similar decisions of other Chambers, Trial Chamber II in the aforementioned case took a purposive approach in their assessment of what could constitute 'prior recorded testimony' under Rule 68. In this regard, the Chamber avoided a restrictive application of the term 'testimony', having in mind the practicalities of the broader investigative and judicial processes contemplated within the Rome Statute.

22. On a different note, it needs to be emphasized that the reduction of the length of judicial proceedings and the more efficient presentation of

[16] ICC-01/04-01/07-2635, para 46-47 and 49

evidence were not the only statutory purposes behind the amended Rule 68. An equally important purpose was to discourage interference with the due administration of justice. Indeed, one of the instances which the Working Group on Lessons Learnt clearly had in mind in expanding the instances for introduction of prior recorded testimony was in connection with interference with a witness by the supporter of a party, or by a party[17]. The Working Group recognized that in such situations, the new Rule 68(2)(d) may create "a broader disincentive for interested persons to interfere with ICC witnesses", and that "[i]n particular, this provision may have a deterrent effect, in that there will be no benefit to interfering with a witness if their prior recorded testimony can be admitted to the Trial Chamber as evidence".

23. Accordingly, it is submitted that the 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, as they squarely fit within the object and policy for the Rules in question, as contemplated by the drafters. Equally important is the inclusion of the said Rules for the purpose of creating a link to Article 70 of the Statute, as contemplated by the Working Group on Lessons Learnt[18]. The fact that the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia also have Rules similar in principle to Rule 68(2)(c)[19] and (d)[20] demonstrates the level of acceptance of the Rules in question in international criminal jurisprudence. This is further justification that prior recorded witness statements taken in accordance with Rules 111 and 112 can qualify as 'prior recorded testimony' in relation to Rule 68(2)(c) and (d).

[17] See paragraph 34 of Annex II.A of ICC-ASP/12/37/Add.1.
[18] Paragraph 37 of Annex II.A of ICC-ASP/12/37/Add.1.
[19] *Vide.*, Rule 92*quater*.
[20] *Vide.*, Rule 92*quinquies*.

24. Regarding the argument by the Appellants that the introduction of written statements in place of oral evidence is wrong in law for allegedly offending the principle of orality, it is noted that the Working Group on Lessons Learnt observed that "the principle of orality enshrined in Article 69(2) is a general principle"[21], and "Rule 68 is an exception to this principle". The Working Group further observed that "considering possible amendments to the Rules on admitting prior recorded testimony is largely an exercise in considering other possible exceptions".

25. It is submitted that it is the character of the statements being not capable of introduction as oral testimony in court that transmutes them into testimony so far as the phrase "prior recorded testimony" is understood, and such statements and transcripts can be admitted in their entirety for the purpose of the amended Rule 68(2)(c) and (d).

26. Regarding the standard of review, it is common ground that the review on appeal looks to correcting errors of principle, either in relation to the law, facts or procedure. From the outset, however, it is submitted (as shall be demonstrated below) that the Trial Chamber did not commit any error of principle and, alternatively, if there was any such error, it was not of such materiality or significance as to override the decision that was reached by the Chamber.

27. Turning now to the argument that the amendment to Rule 68 was adopted with the undertaking that it would not apply to Kenya cases, it is submitted that the adoption did not give rise (and could not in law have given rise) to *blanket* non-retroactivity, and that it must therefore be understood both in *principle* and in *context*. A retroactive or retrospective law is one:

[21] Paragraph 5 of Annex II.A of ICC-ASP/12/37/Add.1.

> *"…which looks backwards or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past"*[22].

28. One therefore needs to interrogate the question whether there were, in the present circumstances, acts or facts occurring, or rights which had accrued to either of the Accused by reason of the application of Rule 68(2)(c) and (d), which can legally form the basis of a non-retroactivity plea or defence. Were there vested rights which were taken away or impaired by the application of the amended Rules? Alternatively, does the application of the amended Rules create a new obligation or impose a new duty or attach a new disability in respect of past transactions or considerations?

29. Starting with Rule 68(2)(c), we find that this provision does not contain any such acts or facts or rights, as it merely seeks to make it possible to introduce prior recorded testimony from a person who has died or has been presumed dead, or who cannot testify orally "due to obstacles which cannot be overcome with reasonable diligence". Rule 68(2)(c) also does not create new obligations or impose new duties which were hitherto non-existent in respect of the Accused persons.

30. Rule 68(2)(d) on the other hand now makes it possible to introduce prior recorded testimony where the person who made the testimony has been subjected to interference. Although it appears at first glance attractive to argue that the application of Rule 68(2)(d) could affect acts, facts or rights acquired by a person being investigated or prosecuted, or impose new obligations under existing laws on such a person, application of the Rule cannot *in principle* affect such acts, facts or rights or impose new

[22] Black's Law Dictionary, Revised 4th Edition (St. Paul, Minnesota, West Publishing Company, 1968)

obligations. This is because a person being investigated or prosecuted cannot challenge evidence introduced pursuant to Rule 68(2)(d) since, in truth, Article 70 of the Statute has in any event already outlawed the interference contemplated by the Rule. In other words, the *principle* of non-retroactivity cannot support *'rights'* accruing from acts or facts which have no recognition in law. Understood within this context, whether the alleged acts of interference took place before 27 November 2013 is immaterial for a consideration of the question of what evidence may be introduced under Rule 68(2)(d).

31. By extension, the introduction of such evidence cannot *in principle* be said to be *to the detriment of the person who is being investigated or prosecuted*, for to do so would be to legitimize an illegality. By the same token, the introduction of such evidence cannot be said to be prejudicial to Article 67 of the Statute as to the rights of an accused person, since such rights can only have their being and legitimacy within a milieu of the *due* administration of justice.

32. Moreover, the policy and purpose of the principle of non-retroactivity is not to benefit the person who is being investigated or prosecuted. Rather, the policy seeks to protect such a person from suffering detriment by rendering inoperative rules that would otherwise take away his vested rights or impose previously inexistent obligations on him. Thus, the Assembly of States Parties did not grant any rights *in personam* by resolving that the amended Rule 68 would not be applied retrospectively to the detriment of a person who was being investigated or prosecuted.

33. By contrast, what was contemplated was the non-operation of the amended Rule in instances where the vested *rights* of such a person stood to be taken away, or new *obligations*[23] imposed on him. Reference to Articles 51(4) and 67 of the Statute in the Resolution must therefore be

[23] The word "obligation" here must be understood in the legal sense, to mean a duty imposed by law, or a liability incurred as a result of the operation of the law.

understood within the narrow context of non-retroactivity which does not in any interfere with the exercise by the Court of jurisdiction over the most serious crimes of concern to the international community, rather than one that gives rise to rights to persons being investigated or prosecuted despite the potential of such non-retroactivity to produce an effect that is inimical to the proper exercise of the Court's jurisdiction.

34. Accordingly, the CLR submits that despite the claim by the Government of Kenya that there was an undertaking that the amended Rule 68 would not apply in respect of the Kenya cases, it is submitted that the Trial Chamber was correct in disregarding the claim in question on the basis of the "*in personam*" argument above. The Appellants have not demonstrated any error of principle on the part of the Trial Chamber in disregarding the claim.

35. Additionally, entertaining the claim and subsequently upholding the position that the amended Rule 68 should not apply to the Kenya cases would have implied that other persons currently being investigated or prosecuted by the Court, or those to be investigated or prosecuted in future, would be able to argue that their rights were affected to their detriment due to the inability to confront their accusers. This would render the enactment of the amended Rule ineffectual. The refusal of the Trial Chamber to privilege the view of the Kenya Government (along with other States Parties that took a similar position) but instead give effect to the common will of the Assembly of States Parties- as an institution- was equally sound in principle.

36. Further, even assuming (although it is not acknowledged) that there was an undertaking made during the drafting process and that the undertaking was disregarded by the Trial Chamber (as has been argued

by the Sang Defence)[24], it is the CLR's submission that any such undertaking was subsumed by and upon the perfection and enactment of the amendment. Not having formed part of the *travaux préparatoires* for the amendment of Rule 68, the so-called undertaking would be irrelevant in aiding the Trial Chamber to interpret the amended Rule.

37. The CLR submits that the statement by witnesses that the information provided in their unsworn statements on material aspects was in effect a "fail[ure] to give evidence with respect to a material aspect included in his or her prior recorded testimony". In this regard, it is submitted that for the Trial Chamber to find "failure", a witness need not neglect or refuse to give evidence on the material respect; it is sufficient if the witness states that he no longer takes the facts contained in his prior recorded testimony to be true, since in such event he has effectively failed to give evidence "with respect to a material aspect included in his… prior recorded testimony". What matters is the effect of the acts of the witnesses, not the manner through which the effect is achieved. It matters not whether the failure to give evidence with respect to a material aspect arises through a witness failing to appear because of interference or, after a laborious exercise to bring him before the Trial Chamber through subpoena power he disavows his prior recorded testimony.

38. With regard to the requisite standard for allowing the introduction of evidence pursuant to Rule 68(2)(c) and (d), it is submitted that the standard to be applied lends itself to adequate clarity. The standard of proof contained in the phrase "evidence of sufficient specificity and probative value" takes its cue from the word "sufficient" which, in common parlance, means "enough" or "adequate". On the other hand, the word "insufficient" means "too little" or "not enough" or "inadequate". All that evidence of "sufficient specificity and probative value" requires to

[24] See paragraphs 17-23 of ICC-01/09-01/11-1982-Conf, "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" " filed on 5 October 2015.

have is, so to speak, a "50% plus 1" level of specificity and probative value. Conversely (and by way of illustration), all that is required for a cheque an amount "X" to be returned to the drawer for "insufficient funds" is for the drawer's account to have any amount less than "X" at the time the cheque is presented for payment. Indeed, for the cheque to be dishonoured the shortfall can be any amount approaching zero. Thus, the proper standard of proof for what amounts to "evidence of sufficient specificity and probative value" specificity and probative value on a balance of probabilities. All that was needed was that the evidence tends to prove

39. The CLR reiterates the submission that it is not at the stage of introduction of prior recorded testimony that the weight to be attached to the testimony is determined. Additionally, the CLR submits that an analogy can and ought to be drawn between the standard of proof for introduction of prior recorded testimony and that applying in connection with a suspect at the stage of confirmation of charges. This is easily discernible when one considers the fact that the evidence introduced as prior recorded testimony does not amount to ultimate proof of guilt, and there are nevertheless other legal safeguards for allowing such evidence open to the person being investigated or prosecuted to subsequently challenge such evidence.

40. With regard to the required level of proof in connection with proof of interference with a witness, it is submitted that evidence pointing indirectly towards interference, but not conclusively proving such interference, is sufficient. This is so bearing in mind that the question of the weight to be attached to prior recorded testimony which is admitted into evidence is a matter to be determined at a later stage by the Trial Chamber.

CONCLUSION:

41. For the above reasons, the CLR submits that the Ruto Defence and Sang Defence Appeals have no merit, and prays that they be rejected and dismissed.

Respectfully submitted,

WILFRED NDERITU

Common Legal Representative for Victims

Dated this 26th day of October, 2015

In Nairobi, Kenya