ICC Trial Monitoring Series

Recent Jurisprudential Developments at the ICC on Retroactivity and the Admissibility of Evidence in the Case against William Ruto and Joshua Sang

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Table of Contents

List of Acronyms and Abbreviations

AC	Appeals Chamber
ad hoc Tribunals	The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda
Art.	Article(s)
ASP	Assembly of States Parties
AU	African Union
CUP	Cambridge University Press
edn.	Edition
ed(s).	Editor(s)
e.g.	Exempli Gratia
ibid.	Ibidem
ICC	International Criminal Court
ICC Statute	Statute of the International Criminal Court
ICC Rules	Rules of Procedure and Evidence of the International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY Rules	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia
n.	Note
OTP	Office of the Prosecutor of the ICC
OUP	Oxford University Press
p.	Page
pp.	Pages
para(s).	Paragraph(s)
Res.	Resolution
TC	Trial Chamber

"[C]riminal courts, be they at the domestic sphere or at the international level, must […] be given space to do their work."[1]

"[T]he prior recorded testimony was admitted without any proper opportunity for the accused to cross-examine the witnesses. […] [I]t cannot be expected that the accused would proceed by eliciting incriminating evidence from the witness in order to be able to subsequently challenge that evidence."[2]

I. Introduction

International criminal trials often take place in politically charged environments, especially if they concern political or military leaders and address violence between different ethnic communities. The trials at the International Criminal Court ('ICC') that deal with the post-election violence in Kenya in 2007-2008 are no exception. While charges against Uhuru Muigai Kenyatta, now President of the Republic of Kenya, were dropped by the Prosecution, the trial against William Samoei Ruto, now Deputy President of Kenya, and Joshua Arap Sang, a former radio host, remains ongoing. In Kenya, these criminal proceedings before the ICC have been politically controversial, and a hotly contested topic of conversation amongst civil society and in the media.[3] After Kenyatta and Ruto rose to power in 2013, tensions increasingly mounted between the Kenyan government, which was backed by the African Union, and the ICC concerning the admissibility and the conduct of the criminal proceedings against sitting heads of state.[4] In such a context, where the case is mired in tremendous political controversy, it is imperative that the independence and impartiality of the adjudicating body be beyond dispute.[5] Yet, the truth-finding function and the fairness of the trial proceedings in the case against Ruto and Sang were put to the test when allegations were made

[1] Separate, Partly Concurring Opinion of Judge Eboe Osuji, 19 August 2015, ICC-01/09-01/11-1938-Anx-Red, para. 43 (citing a statement made by Karim Khan, Lead Counsel for Samuel Ruto).

[2] AC (ICC), judgment of 12 February 2016, ICC-01/09-01/11-2024, para. 93.

[3] See for example L Ochieng and S Jennings, ICC Prosecutor Criticised for Failing to Press Kenya, https://iwpr.net/global-voices/icc-prosecutor-criticised-failing-press-kenya (29.02.2016). See also the analysis of the "exceptional circumstances" of the case against Ruto and Sang in the Separate, Partly Concurring Opinion of Judge Eboe Osuji, 19 August 2015, ICC-01/09-01/11-1938-Anx-Red, paras. 38-40.

[4] AU Assembly, Decision of Africa's Relationship with the ICC, Ext/Assembly/AU/Dec.1(Oct.2013); Republic of Kenya, Statement during the General Debate of the 12th Session of the Assembly of States Parties; Coalition for the International Criminal Court, Report on the 12th Session of the Assembly of States Parties to the Rome Statute, 6-8; T Murithi, Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court, in: G Werle, L Fernandez and M Vormbaum (eds.), Africa and the International Criminal Court (T.M.C. Asser Press 2014), 179, at 190; G Werle and F Jessberger, Principles of International Criminal Law (3rd edn., OUP 2014), paras. 71, 310. At the 12th ASP in 2013, Rule 134 of the ICC Rules was amended to permit "excusal from presence at trial for exceptional circumstances" (Rule 134*ter*) and "due to extraordinary public duties" (Rule 134*quater*), as well as presence of the accused through the use of video technology (Rule 134*bis*); ASP, Amendments to the Rules of Procedure and Evidence, Resolution ICC-ASP/12/Res.7, 27 November 2013, ICC-ASP/12/20.

[5] See e.g. Art. 40 of the ICC Statute (independence of the judges); Art. 42 of the ICC Statute (independence of the Prosecutor); Art. 67 of the ICC Statute (right of the accused to a fair trial).

about deliberate witness interference, reportedly leading to witnesses' non-cooperation, withdrawal, and revocation of their earlier recorded, incriminating statements.[6]

The Prosecution (hereinafter also referred to as "OTP") argued that witnesses withdrew from testimony and recanted their statements because they were intimidated and bribed by a so-called "scheme"—a network of individuals allegedly acting to the benefit of the accused.[7] The OTP requested that the prior unsworn statements of six witnesses, five of whom had testified before the Trial Chamber, be admitted for the truth of their contents pursuant to Rule 68 (as amended in November of 2013), or alternatively pursuant to Art. 69(2) and (4) of the ICC Statute.[8] This was a highly consequential motion for the OTP, as the Prosecution's base of incriminating evidence against Ruto and Sang would appear to be significantly weakened if these prior recorded statements were not admitted by the Trial Chamber.[9] The OTP itself described the testimony of these witnesses as "highly relevant to this case"[10].

Rule 68 of the ICC Rules was amended in November 2013 to increase the circumstances under which the Court could admit prior recorded testimony. Among the specific amendments to the rule was a clause regulating admissibility of prior recorded testimony in cases where witnesses had recanted after being intimidated or bribed. On this basis, the Prosecution sought admission of the six unsworn statements into evidence. However, because the trial against Ruto and Sang began in September 2013, the Defense objected that this was retroactive application of a procedural rule, and the Court had to decide whether the amended Rule 68 could be applied to this case. The parties contested whether the application of Rule 68, as amended, breached Art. 51(4) of the ICC Statute (which requires that amendments to the Rules not be applied retroactively to the detriment of the accused).

The Defense argued that, when the Assembly of States Parties ('ASP') agreed in 2013 to expand the circumstances under which prior recorded testimony could be admitted under Rule 68, they specifically agreed that the amended rule would not be applied in cases that were pending at the time. The OTP submitted that they were not seeking a retroactive application of the amended rule because the testimony in question was not recanted until after November of 2013. After considering the arguments of the parties, Trial Chamber V(a) decided to admit the prior recorded testimony pursuant to amended Rule 68. However, the decision was subsequently reversed on appeal.[11] In February 2016, the Appeals Chamber held that applying the amended Rule to this case was contrary to Art. 51(4) of the ICC Statute.[12]

The decision is noteworthy, since this was the first time that amended Rule 68 was being adjudicated before the Appeals Chamber, and the subject of witness tampering and the reliability of testimonial evidence has been highly controversial at the ICC. It is important to understand this new piece of

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[6] See e.g. J Magdaleno, Disappearance of Key Witness Raises Concerns Over Tampering in ICC Kenya Case, https://news.vice.com/article/disappearance-of-key-witness-raises-concerns-over-tampering-in-icc-kenya-case (29.02.2016).

[7] OTP (ICC), request of 21 May 2015, ICC-01/09-01/11-1866-Red, paras. 2-3.

[8] Ibid., para. 8.

[9] Ibid., para. 2.

[10] Ibid., para. 236.

[11] TC V(a) (ICC), decision of 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2; AC (ICC), judgment of 12 February 2016, ICC-01/09-01/11-2024.

[12] For a timeline, see also https://www.fidh.org/en/region/Africa/kenya/kenya-cases-at-the-icc-understanding-rule-68-controversy-through-15 (29.02.2016).

jurisprudence, insofar as it will certainly impact the investigative practices and trial procedure at the ICC in general. Moreover, given the apparent importance of these witnesses for the Prosecution case,[13] the Appeals Chamber decision is likely to affect the outcome of the Defense's pending 'no case to answer' motion ('NCTA motion'). In anticipation of the Trial Chamber's decision on that mid-trial motion, this report offers a close analysis of the key legal and procedural issues raised throughout the proceedings on the admissibility of the prior recorded statements in the case against Ruto and Sang. It explains in detail the submissions by the parties, the reasoning by Trial Chamber V(a) in its decision of 19 August 2015, and the judgment issued by the Appeals Chamber on 12 February 2016. The concluding section analyzes the impact of the judgment of the Appeals Chamber on the case. The report draws mainly on an analysis of the submissions, the relevant decisions by the Trial Chamber, the judgment and pertinent decisions by the Appeals Chamber.[14] It has to be noted, at the outset, that much factual information on the testimony of the concerned witnesses and on their alleged corruption was treated as confidential by the parties and the Court,[15] and thus could not inform this study.

II. Procedural overview of the ICC case against Ruto and Sang[16]

On 31 March 2013, the majority of Pre-Trial Chamber II authorized the Prosecution to open an investigation into alleged crimes against humanity committed during the post-election violence in Kenya in 2007-2008.[17] Previously, on 8 March 2011, Pre-Trial Chamber II, by majority, had summoned William Samoei Ruto, Joshua Arap Sang, and Henry Kiprono Kosgey to appear before the Court. It held that there were "reasonable grounds to believe" that they had committed the crimes against humanity of murder, forcible transfer of population and persecution.[18] The suspects voluntarily appeared at the initial appearance hearing on 7 April 2011.[19] Just prior to this, on 31 March 2011, the Government of the Republic of Kenya had filed an application to challenge the admissibility of the case pursuant to Art. 19 of the ICC Statute, which was rejected by Pre-Trial Chamber II.[20] This decision was confirmed by the Appeals Chamber on 30 August 2011.[21] The confirmation of charges hearing took place before Pre-Trial

[13] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, para. 5.

[14] Developments and materials issued until the end of February 2016 could be considered.

[15] See for example OTP, request of 21 May 2015, ICC-01/09-01/11-1866-Red, paras. 146-235.

[16] See generally, ICC, Case Information Sheet, ICC-PIDS-CIS-KEN-01-012/13-Eng (last updated on 18 September 2013); all case material can be found on the ICC's website at https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090111/Pages/icc01090111.aspx (29.02.2016).

[17] PTC II (ICC), decision of 31 March 2010, ICC-01/09-19-Corr. The time span covered by the PTC's decision to authorize investigations ranges from 1 June 2005, when the Rome Statute entered into force for Kenya, and 26 November 2009, when the Prosecutor filed his request.

[18] PTC II (ICC), decision of 8 March 2011, ICC-01/09-01/11-1.

[19] See Art. 60 and Art. 61 ICC Statute as well as Rule 121 ICC Rules; PTC II (ICC), decision of 23 January 2012, ICC-01/09-01/11-373, para. 4.

[20] PTC II (ICC), decision of 30 May 2011, ICC-01/09-01/11-101.

[21] AC (ICC), judgment of 30 August 2011, ICC-01/09-01/11-307.

Chamber II from 1 to 8 September 2011.[22] On 23 January 2012, Pre-Trial Chamber II, by majority, confirmed the charges against Ruto and Sang.[23]

Overview of the charges against Ruto and Sang, as confirmed by Pre-Trial Chamber II

	William Samoei Ruto	**Joshua Arap Sang**
Crimes against humanity charged	Murder; Art. 7(1)(a) ICC Statute	
	Deportation/forcible transfer, Art. 7(1)(d) ICC Statute	
	Persecution, Art. 7(1)(h) ICC Statute	
Mode of liability charged	Art. 25(3)(a) ICC Statute[24]	Art. 25(3)(d) ICC Statute[25]

The trial before Trial Chamber V(a) (hereinafter also referred to as the 'Trial Chamber') opened on 10 September 2013 with the Prosecution seeking to prove its case by presenting evidence incriminating the accused. After the close of the Prosecution case, both the Defense for Ruto and the Defense for Sang filed requests for acquittal of the accused (also referred to as "no case to answer" motions).[26] They argued that there was no case to answer since the OTP did not present evidence "on which a reasonable Trial Chamber could convict."[27] A decision on the no case to answer motions is expected in early April 2016.

III. The amendment of Rule 68 in November 2013

Art. 69(2) of the ICC Statute states that "the testimony of a witness shall be given in person" and thus articulates a general preference for *viva voce* testimony in trials at the ICC.[28] The provision at the same time permits exceptions to this principle of orality, "to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence."[29] It further emphasizes that the adoption of such measures may neither be prejudicial nor inconsistent with the rights of the accused, in particular the right of the accused to confront witnesses.[30] Pursuant to Art. 67(1)(e) of the ICC Statute, the accused is entitled to "examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."

[22] PTC II (ICC), decision of 23 January 2012, ICC-01/09-01/11-373, para. 18.

[23] Ibid.

[24] On the notice of the possibility of the legal re-characterization of facts pursuant to Regulation 55 ICC Regulations, see TC V(a) (ICC), decision of 3 June 2014, ICC-01/09-01/11-1334, paras. 30-32 (liability under Art. 25(b), (c) or (d) ICC Statute).

[25] On the notice of the possibility of the legal re-characterization of facts pursuant to Regulation 55 ICC Regulations, see ICC-01/09-01/11-1991-Red; para. 9 (liability under Art. 25(b), (c) ICC Statute ["any of the possible modes of liability"]).

[26] Ruto Defense, request of 26 October 2015, ICC-01/09-01/11-1990-Corr-Red ; Sang Defense, motion of 6 November 2015, ICC-01/09-01/11-1991-Red.

[27] TC V(a), decision of 3 June 2014 ('Decision No. 5'), ICC-01/09-01/11-1334, para. 32 (emphasis omitted).

[28] See also Rule 140 ICC Rules; Y McDermott, Regular Witness Testimony, in: G Sluiter et al. (eds.), International Criminal Procedure: Principles and Rules (OUP 2013), 859, at 866-871.

[29] Article 68 concerns protective measures for witnesses and victims. See generally D K Piragoff and P Clarke, Article 69, in: O Triffterer and K Ambos (eds.), Rome Statute of the International Criminal Court: A Commentary (3rd edn., C.H. Beck/Hart/Nomos 2016), paras. 26, 30.

[30] Art. 69(2) ICC Statute; D K Piragoff and P Clarke, Article 69, in: O Triffterer and K Ambos (eds.), Rome Statute of the International Criminal Court: A Commentary (3rd edn., C.H. Beck/Hart/Nomos 2016), para. 31.

Rule 68 of the ICC Rules regulates one such exception to the principle of orality by governing the requirements for the admission of prior recorded testimony.[31] In the initial version of the ICC Rules of 2002, the scope of Rule 68 was narrow, compared to the respective rules in the legal regimes of the *ad hoc* Tribunals.[32] It allowed the introduction of evidence only if the defense and the prosecution have had an opportunity to examine the witness, either during the recording of the testimony (if the witness is absent at trial, previous Rule 68[a]) or during the proceedings (if the witness is present at trial and does not object to the submission, previous Rule 68[b]).

Based on the experiences in the first trials at the ICC,[33] an amendment was proposed and eventually adopted by consensus at the 12th session of the Assembly of States Parties in November 2013 to widen the scope of the Rule.[34] The chair of the Working Group on Amendments explained that the rationale of the amendment was "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."[35] The amendment to Rule 68 was inspired particularly by the practice of the ICTY, namely Rules 92*bis*, 92*quater* and 92*quinquies* of the ICTY Rules.[36] The Working Group on Lessons Learnt noted in this context that the differences between the legal regimes of the ICTY and ICC had been duly considered.[37]

Compared to the old version of 2002, the amended Rule addresses three additional scenarios when prior recorded testimony may be introduced.[38] Pursuant to paragraph 2(b), prior recorded testimony going to the crime base may be admitted, which is mainly intended to increase the efficiency of the proceedings, for example by avoiding repetitive evidence.[39] By contrast, the second and third scenarios seek to secure evidence when certain obstacles affect or prevent a person's testimony.[40] Rule 68(2)(c) of the ICC Rules allows the introduction of prior recorded testimony if it "comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence,

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[31] On other exceptions in the Rules of Procedure and Evidence, see ibid., para. 27.

[32] See Rules 89, 92*bis*, 92*quater* and 92*quinquies* of the ICTY Rules. See F Gaynor, Admissibility of Documentary Evidence, in: Sluiter et al. (eds.), International Criminal Procedure: Principles and Rules (OUP 2013), 1044, at 1062-1063, 1071.

[33] See ASP Working Group on Lessons Learnt, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), ICC-ASP/12/37/Add.1, Annex II.A, paras. 3, 6.

[34] ASP, Amendments to the Rules of Procedure and Evidence, Resolution, 27 November 2013, ICC-ASP/12/20.

[35] ASP, Oral Report of the Chair of the Working Group on Amendments, Twelfth Session, 20-28 November 2013, Official Records, ICC-ASP/12/20, p. 71; see also ASP, Report of the Working Group on Amendments, 24 October 2013, ICC-ASP/12/44, para. 8.

[36] ASP Working Group on Lessons Learnt, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), ICC-ASP/12/37/Add.1, Annex II.A, para. 4; ibid., ASP Working Group on Lessons Learnt, Comparative Chart of ICTY rules 92 *bis*, 92 *quarter* and 92 *quinquies* and proposed sub-rules 68(2)(b)-(d), ICC-ASP/12/37/Add.1, Appendix.

[37] Ibid., para. 4. See also International Bar Association, Rule 68 Amendment Proposal, Assembly of States Parties, 12 November 2013, 2.

[38] ASP, Working Group on Lessons Learnt, Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37Add.1, para.11; ASP Working Group on Lessons Learnt, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), ICC-ASP/12/37/Add.1, Annex II.A, 18; for an overview of the issues discussed see, ibid., paras. 9-41.

[39] International Bar Association, Rule 68 Amendment Proposal, Assembly of States Parties, 12 November 2013, 2.

[40] Ibid.

unavailable to testify orally." If a person was subjected to interference, prior recorded testimony may be introduced provided that the requirements set out in Rule 68(d) of the ICC Rules are fulfilled.

The scope of the amendment of Rule 68—particularly paragraphs (c) and (d)—was not uncontroversial amongst States Parties and observers.[41] The introduction of prior recorded testimony can affect fair trial rights, especially if the evidence is untested.[42] Rule 68(1) therefore requires that the parties be heard and that the Trial Chamber ensure that the introduction of prior recorded evidence is not "prejudicial to or inconsistent with the rights of the accused".[43] Amended Rule 68(2)(c)(ii) and (d)(iv) further specifies, verbatim, that the "fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it." In its November 2013 Resolution, the ASP particularly emphasized Art. 51(4) of the ICC Statute, which states that amendments to the ICC Rules shall not be applied "retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted."[44]

It was rightly stressed that in practice a cautious approach to the application and interpretation of amended Rule 68 is required, for it constitutes a potentially far-reaching exception to the principle of orality.[45] It remains for the judges to determine *inter alia* to what extent amended Rule 68 does allow for untested, incriminating evidence to be introduced, while duly considering the key importance of the right to a fair trial in criminal proceedings.[46]

Article 51(4) of the ICC Statute: 'Rules of Procedure and Evidence'

The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. 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.

Resolution ICC-ASP/12/Res.7, 27 November 2013 (excerpt)[47]

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. […]

[41] See ASP, Report of the Working Group on Amendments, 24 October 2013, ICC-ASP/12/44, para. 10; B Van Schaack, ICC Assembly of States Parties Rundown, 27 November 2013, https://www.justsecurity.org/3862/icc-assembly-states-parties-rundown/ (29.02.2016); Standard Digital Reporter, ICC rules that President Uhuru Kenyatta must be continuously present at trial, 27 November 2013, http://www.standardmedia.co.ke/?articleID=2000098735&story_title=uhuru-must-attend-icc-trial-judges-rule (29.02.2016).

[42] International Bar Association, Rule 68 Amendment Proposal, Assembly of States Parties, 12 November 2013, 3-4.

[43] See also Rule 68(3).

[44] ASP, Amendments to the Rules of Procedure and Evidence, Resolution, 27 November 2013, ICC-ASP/12/20.

[45] International Bar Association, Rule 68 Amendment Proposal, Assembly of States Parties, 12 November 2013, 3-5.

[46] Ibid., 4-5.

[47] Footnote omitted.

Rule 68(2) of the ICC Rules, as amended: 'Prior recorded testimony' (excerpt)[48]

If the witness who gave the previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony in any one of the following instances: […]

(c) The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. In such a case:
(i) Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability.
(ii) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.

(d) The prior recorded testimony comes from a person who has been subjected to interference. In such a case
(i) Prior recorded testimony falling under sub-rule (d) may only be introduced if the Chamber is satisfied that:
- the person has failed to attend as a witness or, having attended, has failed to give evidence with respect to a material aspect included in his or her prior recorded testimony;
- the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, or coercion;
- reasonable efforts have been made to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness;
- the interests of justice are best served by the prior recorded testimony being introduced; and
- the prior recorded testimony has sufficient indicia of reliability.
(ii) For the purposes of sub-rule (d)(i), an improper interference may relate, inter alia, to the physical, psychological, economic or other interests of the person.
(iii) When prior recorded testimony submitted under sub-rule (d)(i) relates to completed proceedings for offences defined in article 70, the Chamber may consider adjudicated facts from these proceedings in its assessment.
(iv) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.

IV. Witnesses withdrawal and revocation of incriminating out-of-court statements

The case against Ruto and Sang has not been smooth for the Prosecution, who have struggled to contend with the withdrawal of witnesses and revocation of statements that had been previously given to OTP investigators. Following a request by the OTP, the majority of Trial Chamber V(a) issued a 78-page long decision compelling eight unwilling Prosecution witnesses to testify in the case by video-link or at a location in Kenya.[49] In their ensuing courtroom examinations, some of these witnesses recanted incriminating parts of their previous statements, and testified that these had been motivated *inter alia* by promises to be relocated and by bribes.[50]

[48] See ICC Rules of Procedure and Evidence (2nd edn., 2013), ICC-PIDS-LT-02-002/13_Eng.

[49] TC V(a) (ICC), decision of 17 April 2014, ICC-01/09-01/11-1274-Corr2 (Judge Herrera Carbuccia dissented). These witnesses were: Witness 15, Witness 16, Witness 336, Witness 397, Witness 516, Witness 524, Witness 495, Witness 323. The Trial Chamber further requested the assistance of the Government of Kenya in ensuring the witnesses' appearance.

[50] Some of the witnesses mentioned in the decision bear the same pseudonyms as witnesses having appeared before the Trial Chamber in the Ruto and Sang case. It was therefore assumed by observers that these witnesses are identical; see T Maliti, Who are the Witnesses in the Second Kenya Bribery Case at the ICC? – Parts 1 to 3, http://www.ijmonitor.org/2015/09/who-are-the-witnesses-in-the-second-kenya-bribery-case-at-the-icc-part-1/, http://www.ijmonitor.org/2015/09/who-are-the-witnesses-in-the-second-kenya-bribery-case-at-the-icc-part-2/, http://www.ijmonitor.org/2015/09/who-are-the-w itnesses-in-the-second-kenya-

Giving false testimony and corruptly influencing witnesses e.g. through threats or bribery are punishable as so-called "offences against the administration of justice" under Art. 70 of the ICC Statute. In 2013 and 2015, Pre-Trial Chamber II issued arrest warrants against Walter Osapiri Barasa, Paul Gicheru and Philip Kipkoech Bett for the alleged bribery of OTP witnesses in the Kenya situation.[51] These criminal proceedings are conducted separately from the ongoing proceedings against Ruto and Sang. To date, no direct link has been proven between Ruto and Sang and the alleged interference. The Ruto Defense has made pointed efforts in court to distance itself from the witness tampering allegations.[52]

Article 70 of the ICC Statute: 'Offences against the administration of justice' (excerpt)

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

(a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth; […]

(c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence; […]

V. Overview of the parties' submissions to the Trial Chamber

The parties and the Common Legal Representative for Victims[53] presented their arguments and views in writing and at an oral hearing before Trial Chamber V(a) on 25 June 2015.[54] The Ruto Defense filed a request to rule inadmissible the material which the OTP had relied upon, and which was not yet admitted into the record (the so-called 'Inadmissibility Request').[55] The Sang Defense joined the request, whereas the OTP and the Common Legal Representative opposed it.[56] The request of the Government of the Republic of Kenya to file *amicus curiae* observations was rejected by the Trial Chamber.[57]

The following themes were particularly controversial in the submissions:

(1) The application of the amended Rule 68 in the proceedings, namely whether it would offend Art. 51(4) ICC Statute by being retroactive and to the detriment of the accused, and whether alleged undertakings given to States Parties on the non-applicability of the amendment to the Kenyan

bribery-case-at-the-icc-part-3/ (29.02.2016); see also FIDH, Press Release, www.fidh.org/en/region/Africa/kenya/the-kenya-cases-at-the-international-criminal-court-q-a-on-rule-68 (29.02.2016).

[51] PTC II (ICC), warrant of arrest for Walter Osapiri Barasa of 2 August 2013, ICC-01/09-01/13-1-Red2; PTC II (ICC), decision of 10 March 2015, ICC-01/09-01/15-1Red.

[52] See Separate, Partly Concurring Opinion of Judge Eboe Osuji, 19 August 2015, ICC-01/09-01/11-1938-Anx-Red, paras. 35-43; Ruto Defense, response of 23 July 2015, ICC-01/09-01/11-1908-Corr-Red, para. 44.

[53] The written submission by the Common Legal Representative seems to have remained confidential; Common Legal Representative for Victims, response of 11 May 2015, CC-01/09-01/11-1877-Conf.

[54] OTP (ICC), request of 21 May 2015, ICC-01/09-01/11-1866-Red; Ruto Defense, response of 23 July 2015, ICC-01/09-01/11-1908-Corr-Red; Sang Defense, response of 30 June 2015, ICC-01/09-01/11-1911-Corr-Red; Transcript of 25 June 2015, ICC-01/09-01/11-T-207-CONF-ENG (ET) (the transcript is confidential and hence could not inform this report); TC V(a)(ICC), decision of 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2, paras. 1-8.

[55] Ruto Defense, request of 4 May 2015, ICC-01/09-01/11-1872-Red.

[56] Sang Defense, response of 11 May 2015, ICC-01/09-01/11-1875-Conf., OTP (ICC), response of 11 May 2015, ICC-01/09-01/11-1874-Red, Common Legal Representative for Victims, response of 11 May 2015, CC-01/09-01/11-1877-Conf.

[57] TV V(a) (ICC), decision of 29 May 2015, ICC-01/09-01/11-1893.

cases as well as such alleged intent of the Assembly of States Parties on the applicability *ratione temporis* would need to be taken into account;

(2) The definition of the specific requirements set out by the amended Rule 68(2)(c) and (d) of the ICC Rules; and

(3) Whether there existed alternative routes for admitting the statements and interviews, e.g. via Art. 69(2) and (4) of the ICC Statute.

1. The Prosecution's request for admission of written statements and transcripts of interviews[58]

On 21 May 2015, the Prosecution requested that the Trial Chamber admit written statements and transcripts of recorded interviews of witnesses, who were missing or had recanted their testimony allegedly due to "improper influences,"[59] for the truth of their content into the record as "prior recorded testimony" under amended Rule 68 of the ICC Rules, or alternatively under Art. 69(2) and (4) of the ICC Statute.[60] The OTP emphasized that not admitting the material would not only "deny to the Chamber the ability to assess the whole of the evidence,"[61] but "would also reward an attempt to obstruct justice."[62] It submitted that the evidence of the "corrupted" witnesses was of high relevance to the case, namely "concerning the PEV in the areas described in the Document Containing the Charges, the crimes that were committed, and the people responsible for this."[63]

a. Alleged improper witness interference

The Prosecution argued that it was deprived of "a significant portion of the incriminating evidence"[64], which it had intended to present to the Chamber, because of an "organised and effective scheme to persuade Prosecution witnesses to withdraw or recant their evidence, through a combination of intimidation and bribery."[65] This scheme, it was alleged, had been carried out by persons who acted "for the benefit of the accused."[66] In this regard, the Prosecution referred to the warrants of arrest that had been issued by Pre-Trial Chamber II for offences under Art. 70(1) of the ICC Statute.[67]

[58] OTP (ICC), request of 21 May 2015, ICC-01/09-01/11-1866-Red. Large sections of the request were redacted, including those parts that address whether the material met the requirements under amended Rule 68.

[59] Ibid., para. 3.

[60] Ibid., paras. 1, 3-4. Some of the materials in question had already been introduced for purposes other than for the truth of their contents.

[61] Ibid., para. 3.

[62] Ibid.According to the Prosecution, 16 of the original 42 witnesses withdrew their cooperation and refused to give testimony, several witnesses further recanted the contents of the statements they had provided to the Prosecution; ibid., para. 10. See also ibid., para. 139.

[63] Ibid., para. 236.

[64] Ibid., para. 2.

[65] Ibid.

[66] Ibid., paras. 2, 63.

[67] Ibid., para. 65.

The Prosecution submitted that evidence[68] sufficiently proves that the scheme's influence had affected the witnesses in question[69] to withdraw and recant central aspects of the prior recorded statements.[70] According to the OTP, once summoned to appear by the Chamber these witnesses all recanted their evidence in the same manner (according to a "common script"[71]) and were not able to provide a plausible explanation as to why they chose to repudiate their prior statements.[72] The Prosecution averred that "[b]oth the striking similarities in the manner in which the Corrupted Witnesses withdrew their cooperation from the Court, and the manner in which [they] recanted their Prior Recorded Testimony during their testimony, strongly support the interference that they were subjected to improper interference by the same source: namely the Scheme members."[73]

b. The applicability of amended Rule 68 to the case to introduce prior recorded testimony

In seeking the admission of the prior recorded materials, the OTP primarily relied on amended Rule 68, and submitted that the application of amended Rule 68 was neither retroactive nor detrimental to the accused and therefore would not be contrary to Art. 51(4) of the ICC Statute.[74] Prosecutors first argued that the plain terms of the pertinent provisions – Rule 68 and Art. 51(4) ICC Statute – should guide the interpretation of their content, pursuant to Art. 31 and Art. 32 of the Vienna Convention on the Law of Treaties of 1969, and were sufficiently clear to not warrant resort to the drafting history (meaning the negotiations at the ASP in 2013).[75] The Prosecution further submitted that the rule against retroactivity would only be engaged when a new provision is applied to "past events"[76]. Yet, in the current case, Rule 68, as amended, would apply not to past events, but to "procedural steps that are subsequent to the enactment of the new provision."[77] In the view of the Prosecution, the application of Rule 68, as amended, would also not be detrimental to the accused.[78] Both accused were said to have been on notice of the evidence in the statements, and to have had sufficient time to investigate and gather evidence in rebuttal.[79]

The OTP further submitted that amended Rule 68 applies equally to the Prosecution and the Defense.[80] The material would have been admissible even prior to the amendment of Rule 68, pursuant to Art. 69(2)

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[68] On the nature of the supporting evidence and the evidential standard, which the Trial Chamber should apply according to the OTP, see ibid., paras. 57-62.

[69] The names of the witnesses were confidential; issues of witness interference had furthermore been litigated confidentially, see ibid., para. 9.

[70] Ibid., paras. 5, 66--3. See also ibid., para. 10.

[71] Ibid., para. 71 ("Once on the stand, all of the [REDACTED] Witnesses appeared to follow a common script, i.e.: (1) Recanting the most incriminating portions of their Prior Recorded Testimony to the Prosecution, (2) Being generally hostile to the Prosecution's case and supportive of the Accused, and (3) All but [REDACTED] blaming one or more third party for the falsehood of their original statement"). See also ibid., para. 72.

[72] Ibid.

[73] Ibid., para. 68.

[74] Ibid., paras. 14-48.

[75] Ibid., paras. 16-19.

[76] Ibid., para. 24.

[77] Ibid. See further ibid., paras. 22-26.

[78] See ibid., paras. 27-48.

[79] Ibid., para. 30.

[80] Ibid., para. 31.

and (4), Art. 64(9)(a) of the Statute and/or Rule 63(2). The accused could hence not argue to have been "prejudiced by the removal of a pre-existing 'right.'"[81] According to the OTP, amended Rule 68 would moreover contain equivalent if not enhanced safeguards regarding the admission of prior recorded testimony, as compared to the pre-existing legal framework.[82] It also denied that the rights of the accused had been curtailed, since the Defense had the opportunity to cross-examine the witnesses in court during the trial.[83] Furthermore, the Chamber was afforded the opportunity to observe the demeanor of these witnesses in court.[84] Lastly, prosecutors argued that, in situations of witness interference, admitting prior recorded testimony could never be prejudicial to the accused, "particularly where the necessity to admit such evidence is occasioned by the illegal acts of persons acting for the benefit of the Accused."[85] The Prosecution cited jurisprudence from the *Lubanga* as well as the *Katanga* and *Ngudjolo* cases, albeit prior to the amendment to Rule 68, and the *travaux préparatoires* to the Rule 68 amendment in support of a broad interpretation of Rule 68 as encompassing also any written statements taken by the parties during the investigations.[86]

As regards the assessment of the criteria under Rule 68, the Prosecution submitted that the standard generally applied to admissibility determinations should be resorted to, which is lower than the standard of proof applied to the determination of guilt under Art. 66(3) of the ICC Statute.[87] The OTP averred that admitting the prior recorded testimony would be in the interests of justice and would not be detrimental to the accused, citing in particular their opportunity for cross-examination.[88] It would also feature sufficient indicia of reliability.[89]

c. Alternative arguments on the admissibility of the witness statements pursuant to Art. 69(2) and (4) of the ICC Statute

In the alternative, prosecutors argued that, should the judges decline the applicability of Rule 68, the prior recorded testimony could be introduced pursuant to Art. 69(2) and (4) of the Statute.[90] The OTP pointed out that trial chambers enjoy an extensive scope of discretion in admitting evidence, on condition that "its probative value is not outweighed by the prejudicial effect of its admission."[91] Prosecutors argued that the probative value should be inferred from the witnesses having been targeted for corruption, which would indicate that the alleged scheme members regarded their evidence to be sufficiently solid to keep it from the Trial Chamber.[92] The probative value of the accounts, which were described as "highly relevant to this

[81] Ibid., paras. 33-39.
[82] Ibid., paras. 40-43.
[83] Ibid., paras. 44-45.
[84] Ibid., para. 44.
[85] Ibid., para. 46.
[86] Ibid., paras. 53-56.
[87] Ibid., paras. 61-62. The OTP further presented supporting evidence to aid the Chamber in its assessment; see ibid. paras. 57-60.
[88] Ibid., paras. 139-141.
[89] Ibid., paras. 142-145.
[90] Ibid., paras. 49-52, 236-238.
[91] Ibid., para. 49.
[92] Ibid., para. 51.

case",[93] would stem from "internal consistency, intrinsic reliability and –in general- its corroboration by evidence already on the record."[94] No prejudice would be caused to the accused's right to a fair trial, according to the OTP, since the Defence had the opportunity to cross-examine some of the allegedly corrupted witnesses on their previous statements.[95] The Prosecution further argued that, "the Chamber should not entertain claims of prejudice resulting from the admission of this Prior Recorded Testimony in circumstances where the withdrawal/recantation of the witnesses which necessitated this request is the result of improper interference perpetrated for the benefit of the Accused."[96] The prejudice caused to the Prosecution, which would follow from not admitting the prior recorded testimony "in circumstances where it has been deprived of the evidence necessary to prove its case by virtue of the improper interference with its witnesses,"[97] should be taken into account as well by the Chamber.[98] Admitting the prior recorded testimony would assist the Chamber in the fair assessment of the testimony of the corrupted witnesses, by "providing [it] with the totality of their evidence."[99]

Article 69 of the ICC Statute: 'Evidence' (excerpt)

2. 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. [...]

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

2. Counter-arguments submitted by the Defense

This section outlines the main counter-arguments submitted by the Defense for Ruto and Sang (subsequently also referred to collectively as 'Defense') in response to the OTP's submissions. It focuses particularly on Defense arguments on the non-applicability of the amended Rule 68 to this case, an issue further discussed in the appeals proceedings.[100]

a. The OTP seeks to rectify investigative failures

The Ruto Defense claimed that the OTP failed to discharge its "legal and ethical obligation to make all reasonable efforts to ensure that the evidence it presents is reliable and, to the extent possible, complete."[101] Though other measures to preserve evidence "in its most reliable form"[102] would have been

[93] Ibid., para. 236.

[94] Ibid.

[95] Ibid., para. 237.

[96] Ibid.

[97] Ibid., para. 52.

[98] Ibid.

[99] Ibid., para. 238.

[100] See Ruto Defense, response of 23 July 2015, ICC-01/09-01/11-1908-Corr-Red (with several public annexes); Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red.

[101] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 2-3.

available, the Prosecution used neither video nor audio to record the interviews, and requested the admission of untested and unsworn written statements, which would be *prima facie* unreliable.[103] According to the Ruto Defense, the OTP did not properly investigate the reliability and veracity of the prior recorded testimony, e.g. through reference to corroborative evidence.[104]

b. Applying amended Rule 68 to the case is contrary to the intention of the ASP

The Defense for Ruto and Sang argued that applying amended Rule 68 to the Kenyan cases would be contrary to the intention of the Assembly of States Parties (ASP), as evidenced in the Resolution's explicit emphasis on the principle of non-retroactivity and in declarations made by the African Union and the Government of Kenya, and would contradict undertakings made by court officials concerning the use of the amended rule in pending cases, specifically in the Kenya cases.[105] The submissions aver that representations given to States Parties must be taken into account because the ICC Rules principally reflect the will of the ASP, in contrast to the rules of the *ad hoc* Tribunals, which had been drafted and amended by the judges.[106] They further submitted that disregarding the undertakings and the drafting process would violate the rule of good faith as enshrined in Art. 31(1) of the Vienna Convention of the Law of Treaties.[107] The Defense maintained that reports and other sources on the amendment process would make sufficiently clear that concessions had been made to address Kenya's concerns that the amendment would be applied in the ongoing cases. These concessions, Defense argued, were what enabled Kenya to join the consensus-based rule amendment.[108]

c. Applying amended Rule 68 breaches Art. 51(4) of the ICC Statute

The Defense for Ruto and Sang argued that applying amended Rule 68 would offend Art. 51(4) of the ICC Statute by being both retroactive and detrimental to the accused.[109] The Ruto Defense contended that Art. 51(4) expressly stated the intention of the ASP that amendments to the ICC Rules may not be applied retroactively to the accused's "detriment" in ongoing trials; only "neutral or beneficial retroactivity"[110] would be permissible at times.[111] Referring to the plain meaning of the term, the Ruto Defence suggested

[102] Ibid., para. 3.

[103] Ibid., paras. 1-3.

[104] Ibid.

[105] Ibid., paras. 7-12; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 16-26.

[106] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, para. 8; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, para. 22.

[107] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, para. 12; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 23-26.

[108] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 10-11; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 18-19 (The Sang Defense admitted that Kenya's consensus was formally not necessary for the amendment to be adopted, but was sought during the ASP in a "spirit of understanding, cooperation and flexibility"; ibid., para. 19).

[109] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 13-35; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 2, 17-20, 44-58.

[110] Ibid., para. 14 (emphasis omitted).

[111] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, para. 14 (referring to the ICTY decision in the case against *Milutinović* of 5 March 2007 (IT-05-87-T) also relied upon by the OTP). See also Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, para. 27.

that "detriment" should be interpreted in a broad sense as encompassing "any amendment which alters the situation of a person in an on-going case to his disadvantage or will harm the broader interests of the defence."[112] The Ruto Defense admitted that a broad interpretation of "detriment" would contradict the narrow approach adopted by the ICTY in the interpretation of Rule 6(D) ICTY Rules, which requires the defense to show that the application of a rule is prejudicial to a right to which the accused has a legal entitlement.[113] It however argued that the different interpretations could be explained by the different wording of the provisions; while Art. 51(4) refers merely to "the detriment of the person", Rule 6(d) of the ICTY Rules instead mentions "the rights of the accused."[114] Yet, even if the Trial Chamber would favor a narrow approach similar to Rule 6(D), the Defense for Ruto and Sang submitted that Art. 51(4) of the ICC Statute would be offended, since the recorded statements would not have been admissible under the previous Rule, and the fair trial right to confront [that] incriminating witness was detrimentally affected.[115]

The Defense further averred that Rule 68 was amended not only after the beginning of the trial, but also a long time after the statements had been given to the OTP, and subsequent to when most of the alleged interference had occurred.[116] Hence, the issues giving rise to the application would have existed already prior to the amendment.[117] The Defense further rejected the OTP's comparison of the situation with a change in page limit, where the pertinent amendment had been applied retroactively.[118]

In their submissions on the existence of detriment, the Defense for Ruto and Sang pointed to the nature of the evidence as well as the circumstances in which the statements had been given. They emphasized that the introduction of incriminating unsworn (and often hearsay) statements, which had been taken by a party without judicial oversight, went to the acts and conduct of the accused, and had been recanted in-court, would be detrimental to the accused.[119] The Sang Defense contended that the opportunity to cross-examine five of the six concerned witness could merely mitigate such prejudice, but not remedy it.[120] In particular, the Defense could not be expected to elicit incriminating information contained in the prior recorded statements from the witnesses in cross-examination, just to subsequently establish its untruthfulness.[121] According to the Defense for Ruto and Sang, the OTP failed both to demonstrate that the original statements were truthful rather than the testimony given under oath at trial, and to establish that the alleged interference materially affected the witnesses' decision to recant or that the interference was

[112] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, para. 15.

[113] Ibid., para. 17.

[114] Ibid.

[115] Ibid., para. 18; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 32-34 (mentioning that Rule 68 was the *lex specialis* to the overarching admissibility regime set out in Art. 69(4) of the ICC Statute; ibid. para. 33).

[116] Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 15, 29-30.

[117] Ibid., para. 29.

[118] Ibid., paras. 28-29.

[119] Ibid., para. 20; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 39-40. The Sang Defense in this context stressed the following three issues: "(i) these were unsworn, out-of-court statements, made without potential liability for perjury; (ii) the Prior Statements were not taken in neutral circumstances, and this limits their reliability, and (iii) it poses equality of arms problems given the Prosecution's greater capacity and resources to obtain statements in this manner, for use at trial" (ibid., para. 39).

[120] Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 43-44.

[121] Ibid., para. 44.

performed to the benefit of the accused.[122] Introducing the statements would not only make the proceedings unfair for the accused by weakening the right to confrontation, it would also complicate the Trial Chamber's task of ascertaining the truth, and hence impede the efficiency of the trial.[123]

The Ruto Defense contended that the OTP's reasoning on why no detriment could be shown was "fundamentally flawed"[124], as it implicitly acknowledged the existence of detrimental effects, but then attempted to mitigate them.[125] They argued that Art. 51(4) of the ICC Statute merely required that detriment is shown; whether it could be mitigated would not be a necessary part of the analysis.[126] Moreover, the Ruto Defense *inter alia*[127] stressed that the fact that the Rule was theoretically available to both parties would not answer whether its use was detrimental.[128] Art. 51(4) of the ICC Statute expressly states that only the detriment of the person who is being prosecuted should be taken into consideration.[129] The Ruto Defense rejected the OTP's interpretation of ICTY jurisprudence, as well as their reliance on a ruling in the *Lubanga* case. Defense submitted that the materials could not have been admitted under the previous Rule 68,[130] and averred that "[t]he real problem confronting the OTP is that the materials do fall within the original rule [and] that the OTP seeks to side-step the strictures of [the original] rule by arguing that it does not apply."[131] The procedural regime under the old Rule 68 would also contain the greater safeguards, as the material would not have been admissible.[132]

d. Applying amended Rule 68 offends Art. 24(2) of the ICC Statute

The Defense for Ruto and Sang further relied on Art. 24(2) ICC Statute in arguing that amended Rule 68 was inapplicable, either additionally or alternatively to Art. 51(4) of the ICC Statute.[133] Referring *inter alia* to various scholarly publications, they proposed a broad interpretation of "law" in Art. 24(2); the provision would consequently not only pertain to substantive criminal law, but also to procedural law,

[122] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, para. 30; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 44-46.

[123] Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, para. 46. The Sang Defense furthermore emphasised the importance of the principle of orality, see ibid., paras. 54-58.

[124] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, para. 19.

[125] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, para. 19. (See also Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, para. 43)

[126] Ibid.

[127] For detailed arguments see Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 20-31.

[128] Ibid., para. 21.

[129] Ibid.; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 47 ("equates rights of the accused with purported and in fact inexistent rights of the Prosecution") and 48 (rejecting the OTP's reliance on the *Šešelij* case).

[130] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 22-27.

[131] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, para. 24. See also Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, para. 31.

[132] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, para.28 (arguing that the OTP's comparison of safeguards in the regime prior to and after the amendment would have been based on both an inappropriate standard and the incorrect comparator).

[133] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 32-35; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 50-53.

including the ICC Rules.[134] Art. 24(2) of the ICC Statute would only require that the new rule was less favorable to the accused than the old version, which would be the case in the present circumstances.[135]

Article 24 of the ICC Statute: 'Non-retroactivity *ratione personae*' (excerpt)

2. 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.

e. The requirements of amended Rule 68(2)(c) and (d) are not satisfied[136]

In light of the alleged exceptional circumstances surrounding the OTP's application for the admissibility of the statements and their particular nature, the Defense submitted that the appropriate evidential standard in determining whether the requirements under amended Rule 68 of the ICC Rules were met would be "beyond reasonable doubt," or at least a higher standard of proof than a mere balance of probabilities.[137] The Defense also maintained that the material in question, which included mere summaries of statements written by a party to the proceedings without neutral judicial oversight pursuant to Rules 111 and 112 of the ICC Rules, would not qualify as prior recorded testimony under amended Rule 68 of the ICC Rules.[138]

In regard to Rule 68(2)(d)(i), the Sang Defense contended that the Prosecution sought the admission of the incriminating statements of six witnesses (amounting to 1/5th of the overall number of OTP witnesses), half of whom would be central or linkage witnesses who had recanted their statements in court.[139] Relying on juristic literature and case law of the ICTR and SCSL, Defense argued that at least the incriminating parts of the statements going to the acts and conduct of the accused should not be admitted for the truth of their contents.[140] As regards amended Rule 68(2)(d) of the ICC Rules, the Defense submitted that it was not intended to apply to witnesses who have given *viva voce* testimony.[141] The Defense for Ruto and Sang also averred that the concerned witnesses had not failed to attend or to give evidence on material aspects of their statements. In the formal courtroom setting, the witnesses had merely testified differently compared to their original account, and it would have been incumbent on the OTP to make all reasonable efforts to properly investigate and examine the witnesses in these circumstances.[142] In the view of the Defense, improper interference was never sufficiently proven, nor was it the only possible inference that could be drawn from the revocation of the statements.[143]

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[134] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 32-35; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 50-53.

[135] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 34-35; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, para. 53.

[136] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 100-223; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, para. 3.

[137] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 36-40; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 109-114.

[138] Ibid., paras. 59-64.

[139] Ibid., paras. 65-77; Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 132-134.

[140] Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, para. 71.

[141] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, para. 101.

[142] Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 78-99.

[143] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 49-99; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 109-141.

The Defense for Ruto and Sang rejected the OTP's claim that the prior recorded testimony featured sufficient indicia of reliability under amended Rule 68(2)(d)(i).[144] "[A]ll relevant factors"[145] should be taken into account by the Chamber, in particular given the OTP's heavy reliance on hearsay evidence.[146] Such factors were said to include *inter alia* the involvement of only one party in the recording of the statement, the lack of an oath or any sanctions for perjury, the witnesses' motivations and opportunities for collusions (e.g. difficult financial circumstances, contact amongst the witnesses), the lack of corroboration while contradicting evidence was presented, and that cross-examination by the Defense supported the in-court testimony.[147]

In the view of the Defense, the admission of the materials would also not be in the interests of justice.[148] The OTP was not "deprived" of the evidence given that the witnesses had testified and the statements were not *prima facie* reliable. It was argued that it would be unfair to introduce the main incriminating evidence in written form, in particular when the witnesses had recanted material incriminating aspects during sworn testimony.[149] In particular, its introduction would entail a disparate treatment compared to the *Kenyatta* case and thus be unfair to the accused.[150] The accused would furthermore not benefit from the withdrawal of the witnesses as it withheld the Defense the right to confront them.[151] The Ruto Defense contended that no evidence was presented linking Ruto to the alleged scheme.[152]

In addition, it was averred that the statements would not be admissible pursuant to amended Rule 68(2)(c) either; the main emphasis of the submissions though lay on amended Rule 68(2)(d).[153]

f. No admission of the statements under Art. 69(2) and (4) of the ICC Statute

The Defense also argued that the materials were not admissible for the truth of their contents under Art. 69(2) and (4) of the ICC Statute (nor under the old Rule 68). Rule 68 was described as *lex specialis* for testimonial evidence to the general admissibility scheme in Art. 69(4).[154] Relying on the general provisions of Art. 69(2) and (4) of the ICC Statute would circumvent Rule 68 of the ICC Rules.[155] It was

[144] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 107-131; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 100-108.

[145] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, para. 112.

[146] Ibid.

[147] Ibid., paras. 114-131; Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 102-108.

[148] Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 142-147.

[149] Ibid., paras. 145-146.

[150] Ibid., para. 144.

[151] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 45-46, 137-139.

[152] Ibid., para. 44. See also annexes C.1 (ICC-01/09-01/11-1908-AnxC.1) and C.2 (ICC-01/09-01/11-1908-AnxC.2) to the Ruto response of 23 June 2015.

[153] Ibid., para. 219.

[154] Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 33, 37 (referring to a ruling in the *Bemba* case).

[155] Sang Defense, response of 24 June 2015, ICC-01/09-01/11-1911-Corr-Red, paras. 34-35 (reference is made in this context to jurisprudence in the *Katanga* and *Ngudjolo* case).

submitted, *arguendo*, that the material would lack indicia of reliability and therefore probative value, and that the prejudice to the accused would outweigh any probative value.[156]

VI. The Trial Chamber's decision to admit written statements pursuant to amended Rule 68

Trial Chamber V(a)[157] issued its decision on the Prosecution request on 19 August 2015. The majority admitted the prior recorded testimony of five out of the six witnesses mentioned in the request pursuant to Rule 68(2)(c) and (d).[158] It first addressed legal issues pertaining to the application of the amended Rule 68 of the ICC Rules in the case against Ruto and Sang, focusing in particular on whether the application of amended Rule 68 was retroactive to the detriment of the accused. The Chamber then assessed whether the specific requirements of Rule 68(2)(c) and (d) were met. Judge Eboe-Osuji added a separate, partly concurring opinion; he considered Art. 69(3) of the ICC Statute to be an adequate legal basis for admitting the witness statements for the truth of their contents.[159]

1. The ASP did not bar the application of amended Rule 68 in this case

Trial Chamber V(a) initially examined whether the ASP barred the application of amended Rule 68 in the present case.[160] The Chamber found that neither the text of the amended Rule 68 nor the Resolution of the ASP contain an explicit time limitation as to when the amended Rule would apply.[161] It was noted that the ASP explicitly stressed the application of Art. 51(4) of the ICC Statute only in general terms.[162] The Chamber accordingly held that the sole conclusion which could be drawn from the wording of the Resolution of 27 November 2013 were that Rule 68 may apply as amended in this case, provided that Art. 51(4) of the ICC Statute is being considered.[163] Thus, only if amended Rule 68 were applied "retroactively to the detriment of the person who is being […] prosecuted", would Art. 51(4) ICC Statute bar its application.[164]

In this context, the Trial Chamber reiterated its previous considerations underlying the rejection of the request of the Government of Kenya to present its understanding of the drafting history to the Court.[165] It stated that the Chamber "cannot privilege a limited number of States Parties' views over the collective will of the ASP reflected in the resolution amending Rule 68."[166]

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[156] Ruto Defense, response of 23 June 2015, ICC-01/09-01/11-1908-Corr-Red, paras. 220-223.

[157] Trial Chamber V(a) is composed of Judge Chile Eboe-Osuji (Presiding), Judge Olga Herrera Carbuccia and Judge Robert Fremr.

[158] TC V(a)(ICC), decision of 19 August 2015, ICC-01/09-01/11-1938_Corr_Red2.

[159] Separate, Partly Concurring Opinion of Judge Eboe Osuji, 19 August 2015, ICC-01/09-01/11-1938-Anx-Red.

[160] TC V(a)(ICC), decision of 19 August 2015, ICC-01/09-01/11-1938_Corr_Red2, paras. 14-19.

[161] Ibid., para. 17.

[162] Ibid.

[163] Ibid., para. 19.

[164] Ibid.

[165] Ibid., para. 18.

[166] Ibid.

2. Art. 51(4) of the ICC Statute applies, not Art. 24(2)

The Chamber considered that amended Rule 68 is not governed by Art. 24(2) of the ICC Statute, but by Art. 51(4) ICC Statute, as the latter provision constitutes the *lex specialis* for amendments to the ICC Rules.[167] It observed that Art. 24(2), together with Art. 22 and Art. 23 of the Statute, establishes the principle of legality applicable before the ICC, with these three provisions pertaining to substantive law, such as the crimes under Art. 5 to Art. 8*bis* of the ICC Statute.[168] In the view of Trial Chamber V(a), "the principle of non-retroactivity is more applicable to matters of substance than to those of procedure."[169] Furthermore, if all amendments fell under Art. 24(2), Art. 51(4) would be rendered "almost entirely redundant".[170]

3. No retroactive application to the detriment of the accused

The Chamber then examined whether applying amended Rule 68 in the case would be retroactive and to the detriment of the accused under Art. 51(4) ICC Statute. It first rejected that applying Rule 68 constituted a retroactive application of the provision.[171] In the view of the judges, the Prosecution did not seek "to alter anything which the Defence ha[d] previously been granted or been entitled to as a matter of right,"[172] but sought "to apply the provision prospectively to introduce items into evidence for the truth of their contents."[173]

Even if the admission of the written statements was considered to be a retroactive application of amended Rule 68, the Chamber did not deem it to be inherently detrimental to the accused under Art. 51(4) of the ICC Statute.[174] According to the Trial Chamber, the determination of whether the application of Rule 68, as amended, would be to the detriment of the accused is to be made "in the abstract,"[175] by looking at Rule 68 "on its face alone"[176] and "not at any concrete application of it."[177] An evaluation of any concrete application of amended Rule 68 "would create uncertainty and double standards across procedural amendments."[178] Trial Chamber V(a) considered amended Rule 68 to be "a rule of neutral application."[179] Since all parties could request the admissibility of evidence pursuant to the Rule, it could not be interpreted as being inherently detrimental to the accused.[180] Furthermore, it held that "[t]he application of Rule 68 [could not] be considered detrimental to the accused simply because it allows the Prosecution to

[167] Ibid., para. 22.
[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Ibid., para. 23.
[172] Ibid.
[173] Ibid.
[174] Ibid., paras. 24-25.
[175] Ibid., para. 24.
[176] Ibid.
[177] Ibid.
[178] Ibid.
[179] Ibid., para. 25.
[180] Ibid.

request the admission of incriminatory evidence against the accused."[181] According to the Chamber, such conclusion would be consistent with the jurisprudence of the ICTY on the applicability of analogous provisions (Rules 92*quater* and 92*quinquies* of the ICTY Rules), which it relied upon as "persuasive authority" despite the difference in language between Rule 6(D) ICTY Rules (which refers to "prejudice") and Art. 51(4) ICC Statute (which speaks more broadly of "detriment").[182] After having rejected that detriment would arise from an abstract perspective, the Trial Chamber nevertheless stated that it would "assess any detriment to the accused in any concrete application of the amended Rule 68,"[183] specifically when "deciding whether it is in the interests of justice to admit the prior recorded testimony under Rule 68(2)(d)(i)."[184]

4. Statements and transcripts of interviews taken under Rules 111 and 112 qualify as "prior recorded testimony"

Having established that Art. 51(4) does not bar the application of Rule 68 in this case, the Chamber addressed whether written witness statements and transcripts of interviews that were taken pursuant to Rules 111 and 112 of the ICC Rules qualified as prior recorded testimonies within the meaning of amended Rule 68.[185] Statements and transcripts taken under these Rules do not require the witness to take an oath or affirmation.[186] The Trial Chamber interpreted the notion of prior recorded testimony broadly and considered it to also encompass written statements.[187] Such an extensive interpretation would be in line with the intention of the ASP,[188] pertinent jurisprudence of Trial Chambers I-III of the ICC on the old Rule 68,[189] as well as the language and purpose of the amended Rule.[190]

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[181] Ibid., para. 24.

[182] Ibid., para. 26. The Trial Chamber referred to several decisions of ICTY Chambers, which it found to be "more persuasive" than the decision issued by Trial Chamber III in the *Bemba* case (ICC-01/05-01/08-3019-Red) upon which the Defense had relied; ibid., n. 32. The Trial Chamber further noted that the French version of Art. 51(4) speaks of "prejudice"; ibid., n. 34.

[183] Ibid. para. 27.

[184] Ibid.

[185] Ibid., paras. 28-33.

[186] Ibid., para. 28.

[187] Ibid., para.

[188] The Chamber regarded the report of the Working Group on Lessons Learnt to be "the primary public source on the drafting history of the amended Rule 68" (ibid., para. 30). In its report on the proposed amendment in 2013, the Working Group stated that prior recorded testimony "is understood to include video or audio recorded records, transcripts and written statements. This is the view in the prevailing jurisprudence to date, and it was considered unduly restrictive to understand 'prior recorded testimony' in a narrower manner. Rule 68 may therefore apply to written statements taken by the parties or (inter)national authorities, provided that the requirements under one or more of the sub-rules are met." See ASP Working Group on Lessons Learnt, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), ICC-ASP/12/37/Add.1, Annex II.A, para. 13. Trial Chamber V(a) considered the report to demonstrate "at least an openness, for the amended Rule 68 to continue to apply to recorded statements under Rules 111 and 112" (TC V(a)(ICC), decision of 19 August 2015, ICC-01/09-01/11-1938_Corr_Red2, paras. 30-31).

[189] Ibid., para. 31.

[190] Ibid., paras. 30-32. Otherwise, the requirement in Rule 68(2)(b) was said to be redundant. A narrow reading would also considerably restrict the practical application of the amended Rule 68.

5. The Chamber must be "satisfied" that the requirements under Rule 68 are met

The Trial Chamber held that "evidence of sufficient specificity and probative value must be provided to satisfy the Chamber that the requirements under Rule 68 of the [ICC] Rules are met."[191] The request of the Defense that a higher standard of proof, such as the standard of proof "beyond reasonable doubt", should be applied was rejected.[192] The Chamber emphasized that the standard of proof "beyond reasonable doubt"[193] applies when it ultimately decides on the guilt or innocence of the accused based on the totality of evidence. Extending the standard to the Rule 68 context would "unduly limit the Chamber's ability to consider potentially relevant, probative evidence in its assessment of the merits."[194]

6. Specific observations on Rule 68(2)(d)

Before turning to the analysis whether the requirements of Rule 68(2)(d) were met in the circumstances of the case, the Trial Chamber made specific observations on the interpretation of certain criteria of the provision.

a. Interpretation of failing "to give evidence with respect to a material aspect"[195]

Rule 68(d) (i) applies when a person who has been subjected to interference failed to attend or "to give evidence with respect to a material aspect indicated in his or her prior recorded testimony." The Trial Chamber noted that a witness who is present at trial but refuses to testify at all indisputably falls within the scope of the Rule.[196] It then examined whether the situation that witnesses appear and their testimonies at trial deviate from their prior recorded testimonies is also covered.[197] In the view of the Chamber, a narrow understanding of the Rule would entail that prior recorded testimony could be introduced if a witness was "intimidated into silence,"[198] but not if this same intimidation led the witness to recant key aspects of the prior recorded testimony.[199] Trial Chamber V(a) saw no reasons for treating these two situations differently, and decided "that a recanting witness is not necessarily removed from the scope of the [amended Rule 68(2)(d)]."[200] Explanations for the change in testimony, including whether the submitting party failed to sufficiently probe deviations, would need to be considered on a case-by-case basis, in particular in deciding whether "reasonable efforts have been made [...] to secure from the witness all material facts known to the witness" according to Rule 68(2)(d)(i).[201]

[191] Ibid., para. 37.
[192] Ibid., paras. 35-36.
[193] Art. 66(3) ICC Statute.
[194] TC V(a)(ICC), decision of 19 August 2015, ICC-01/09-01/11-1938_Corr_Red2, para. 36.
[195] Rule 68(2)(d) ICC Rules.
[196] TC V(a)(ICC), decision of 19 August 2015, ICC-01/09-01/11-1938_Corr_Red2, para. 40.
[197] Ibid., paras. 40-41.
[198] Ibid., para. 41.
[199] Ibid.
[200] Ibid., para. 42. See also para. 41.
[201] Ibid., paras. 41-42.

b. The alleged interference need not be attributable to the accused

The Chamber emphasized that Rule 68(2)(d) would not require that the interference is attributable to either the accused or the defense team.[202] Whether or not the accused is involved in the interference could though be taken into account in deciding whether the admission of the prior recorded testimony is in the interests of justice.[203]

7. The Chamber's assessment of the requirements under Rule 68(2)(d)[204]

The Trial Chamber then proceeded by evaluating whether the requirements set forth in Rule 68(2)(d) were met with regard to each of the five witnesses concerned. It ultimately decided to admit the prior recorded testimonies of four witnesses pursuant to Rule 68(2)(d) and rejected the OTP's request regarding one witness. Much information in the factual assessment of the Chamber was redacted. The criteria referred to by the Chamber in its assessment under Rule 68(2)(d) are illustrated in the following:[205]

a. Nature of the prior recorded testimony

As far as can be discerned given the many redactions in the respective paragraphs of the decision, the Trial Chamber admitted written statements for the truth of their contents, as well as other related material in accompanying annexes.[206]

b. Whether the witness failed to give evidence with respect to a material aspect of the prior recorded testimony

The Trial Chamber emphasized that the concerned witnesses had recanted fundamental aspects of the prior recorded testimonies relating to the accused or even the "entire statement concerning the facts of the case.".[207] With regard to one witness, the Trial Chamber took note that the prior recorded testimony was said to have been prepared by another and then signed by the witness in exchange for *inter alia* the possibility to live abroad.[208] By referring to its general observations on the requirements of Rule 68(2)(d), the Court rejected submissions by the Sang Defense that witnesses had addressed all material aspects by

[202] Ibid., para. 44.

[203] Ibid.

[204] Ibid., paras. 45-133.

[205] The following descriptions of the criteria which are written in italics (sections a. to f.) reproduce the language used by the Trial Chamber (ibid.).

[206] Ibid., paras. 45, 68, 87, 98, 118. The Chamber observed that these materials had been "used and explained by the witness" (ibid., paras. 45, 68, 87, 98, 134.), and were "necessary to understand the contents and context of the prior recorded testimony" (ibid.). Some of the material was said to have been referred to by the respective witness during testimony in court. With regard to some written statements and other material that was admitted, the Trial Chamber noted that it had already been admitted or tendered before for the limited purpose of credibility assessments, either in original form or as a redacted version. See ibid., paras. 68, 87, 98, 118.

[207] Ibid., paras. 47-48, 71 (noting the extensive degree to which the testimony had differed from the original statement given to the OTP), 89 (the Chamber noted that the witness had stated that the previously recorded testimony was false when examined by the OTP), 100, 120.

[208] Ibid., para. 100.

testifying that the previous statements were untrue.[209] Potential reasons for the failure would be addressed in the context of the other criteria under Rule 68(2)(d).[210]

c. Whether reasonable efforts have been made to secure all material facts known to the witness

In examining the question "whether reasonable efforts [had] been made to secure all material facts known to the witness,"[211] the Chamber in particular took into consideration that witnesses were thoroughly questioned by the OTP, appeared before the Chamber, and were examined in-depth (including on the causes for the divergence) by the parties at trial.[212] Trial Chamber V(a) rejected submissions by the Sang Defense claiming that the OTP had failed to put certain portions of their respective prior recorded testimonies to two witnesses.[213]

d. Whether the witness's failure to give evidence has been materially influenced by improper interference

The Trial Chamber was satisfied that the failure to give evidence of four of the five witnesses concerned was materially influenced by improper interference.[214] In this context, the Chamber *inter alia* noted financial incentives and threats as motivations for the withdrawal and the revocation of the prior recorded testimonies.[215] The Chamber further observed similarities in the pattern of interference of the other concerned witnesses.[216] With regard to one witness, the Chamber was not satisfied that the information provided by the Prosecution, which included the witness's signed affidavit, the testimony in court, the manner of breaking off contact with the Court as well as other evidence already on the record, was sufficient to meet the criterion of Rule 68(2)(d). The Court consequently rejected the request.[217]

e. Whether the interests of justice are served

The Trial Chamber then assessed whether the introduction of the prior recorded testimonies served the interests of justice in some detail. In this context it initially reiterated that the main purpose of Rule 68 was to expedite the proceedings.[218] The Trial Chamber further emphasized that "the notion of interests of justice should be linked to the right of the accused to be tried without undue delay,"[219] and that it may take into account "all evidence that it considers necessary for the determination of the truth" pursuant to Art. 69(3) ICC Statute.[220] The Chamber took note of the OTP's submissions that the respective prior recorded

[209] Ibid., paras. 101-102, 121.

[210] Ibid., paras. 48, 72, 90, 102, 121.

[211] Ibid., paras. 42, 49-50, 73-74, 91-92, 103, 122.

[212] Ibid., paras. 49, 73, 91, 103, 122. In regard to one witness, the Sang Defense argued that the OTP could not claim to have taken all reasonable efforts when it did not question the witness at all on Sang's involvement during its cross-examination. The Trial Chamber however observed that the concerned witness was examined and cross-examined on the matter and thus rejected the submission ibid., para. 50.

[213] Ibid., paras. 74, 92.

[214] Ibid., paras. 55, 78.

[215] Ibid., paras. 55, 78.

[216] Ibid., paras. 55, 107-108.

[217] Ibid., paras. 93-97.

[218] Ibid. para. 60.

[219] Ibid.

[220] Ibid., paras. 60, 81, 111, 128.

testimony was important in relation to the case as a whole.[221] Moreover, it considered "the element of systematicity of the interference of several witnesses […] which gives rise to the impression of an attempt to methodically target witnesses of this case in order to hamper the proceedings."[222] The Trial Chamber stated that it would "not allow such hindrance and [that it would] safeguard the integrity of the proceedings."[223]

While the prior recorded testimonies went to the acts and conducts of the accused, the Chamber considered that the Defense had the opportunity to cross-examine the witnesses during their respective testimonies at trial.[224] With regard to the four witnesses, the Chamber held that "the unproven link between the improper interference and the accused [would not] affect its determination that the interests of justice would be served if this prior recorded testimony is admitted"[225], as the admission would not be "unduly detrimental to the accused."[226] The Chamber noted that when assessing the prior recorded testimony in the ultimate decision on the guilt or innocence, it would weigh its probative value and reliability, taking into account the nature of the evidence, in particular if it is hearsay evidence, whether the prior recorded testimony goes to the acts and conduct of the accused, and whether there is any corroborating evidence admitted in the record.[227]

f. Whether the prior recorded testimony has sufficient indicia of reliability

The Trial Chamber lastly examined whether the prior recorded testimonies had sufficient indicia of reliability as is required by Rule 68(2)(d). In its assessment, the Chamber frequently referred to the jurisprudence of the ICTY.[228] Initially, the Chamber reiterated that the reliability assessment under Rule 68 was only preliminary in nature, as the final weight attached to the prior recorded statements would be determined in the ultimate assessment on the guilt or innocence of the accused based on the totality of the evidence.[229] The threshold to be applied in this reliability assessment would therefore be "reasonably lower,"[230] compared to the threshold for deciding ultimately on the guilt or innocence.[231] The Chamber further observed that there was an overlap between the nature of reliability assessments under Rule 68(2)(d) of the ICC Rules and that under Art. 69(4) of the ICC Statute.[232]

The indicia of reliability referred to in its assessment were considered by the Chamber to not be exhaustive and none of the indicators were of definitive character.[233] It noted that "even where one or

[221] Ibid., para. 60.
[222] Ibid.
[223] Ibid.
[224] Ibid., paras. 60, 81, 111, 128.
[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] See ibid., para. 65.
[229] Ibid.
[230] Ibid.
[231] Ibid.
[232] Ibid.
[233] Ibid.

more of the indicia [were] absent the Chamber may still admit the material, and [could] consider the absence of such indicia, together with other relevant factors, when ultimately weighing all the evidence before it."[234].[235] The witness's revocation of the prior recorded testimony would not automatically constitute an indication of unreliability, in particular when the OTP had made "noteworthy efforts to examine the witness, and the witness was also extensively examined by the Defence."[236] Inconsistencies with other evidence in the record, including the testimony in Court, were not deemed by the Chamber to be sufficient to make the prior recorded testimony unreliable under Rule 68(2)(d), given the presence of other, formal indicia of reliability.[237] Inconsistencies were however to be taken into account in the final assessment on the weight of the prior recorded testimony.[238]

8. The Chamber's assessment of the requirements under Rule 68(2)(c)

In respect to the prior recorded testimony of one person, the Chamber examined whether the requirements set forth in Rule 68(2)(c) were met. It was satisfied that the witness was "unavailable to testify orally due to obstacles that could not be overcome with reasonable diligence", pursuant to Rule 68(2)(c) of the ICC Rules. The Chamber in this context noted *inter alia* that attempts by the OTP to reach and trace the person were unsuccessful and that the witness did not appear for testimony as scheduled.[239] The Chamber was also satisfied that the necessity of measures under Art. 56 of the ICC Statute could not have been anticipated for the witness.[240] Lastly, it examined whether the prior recorded testimony had sufficient indicia of reliability.[241] That the witness was not cross-examined would not affect its admissibility under Rule 68(2)(c), but could be taken into account when evaluating the ultimate weight to be attributed to it.[242] The Trial Chamber rejected the submission of the Ruto Defense that incriminating parts of the prior

[234] Ibid.

[235] The Chamber distinguished between indicia relating to the circumstances in which the testimony was made and indicia relating to the content of the prior recorded testimony. (ibid.) Formal indicia of reliability included that the OTP obtained the prior recorded testimony "in the ordinary course of its investigations" (ibid., paras. 66, 85, 115, 132), that the statement was signed by the witness and two investigators having conducted the interview, and that it contained a signed "Witness Acknowledgment"; see ibid., paras. 66 (the Chamber also mentioned that the witness had recognized the signature during testimony in Court), 85, 115, 132. Other indicia were the presence of a qualified interpreter when the statement was made and that the witness had taken an oath (though an oath is not a formal requirement) or alternatively signed a declaration that the statement was to the best of the witness's knowledge; ibid. para. 65. That the interview was conducted in English, but the witness testified in court mainly in Swahili was not considered by the Chamber to render the prior recorded testimony per se unreliable, though this fact may be taken into account in the final assessment; see paras. 113, 116 (the witness in question was said to have been able to understand and follow English and even answered partly in English). Indicia going to the content include the absence of manifest inconsistencies, whether the testimony was subjected to cross-examination and corroboration through other evidence; see ibid., para. 65.

[236] Ibid., paras. 67, 116.

[237] Ibid., paras. 86, 117, 133.

[238] Ibid.

[239] Ibid., paras. 136-138.

[240] Ibid., paras. 139-140.

[241] Ibid., paras. 141-145. The Chamber observed that the prior recorded testimony, though not taken under oath, appeared to have been taken in the ordinary course of the OTP's investigations by two investigators, was initialed by the witness, the investigators and interpreter, and contained a signed "Witness Acknowledgment" and a signed "Interpreter Certification". The Chamber considered this sufficient to indicate the witness's acceptance of the truthfulness and accurateness of the testimony; ibid. para. 144.

[242] Ibid., para. 145.

recorded testimony would be contradicted by "objective evidence not part of the trial record."[243] In the view of the Chamber, the prior recorded testimony should not be weighed based on material not in the record.[244] However, while the witness's potential motivations for giving the statement were considered not sufficient to make the prior recorded testimony inadmissible, they could be of relevance in the final assessment.[245]

9. The inadmissibility request of the Ruto Defense is moot

The Chamber stated that it had rendered its decision on the OTP request solely on the basis of evidence which was already admitted into the record, and therefore considered the Inadmissibility Request submitted by the Ruto Defense to be moot.[246]

10. Rejection of the OTP's alternative request to admit the statements pursuant to Art. 69(2) and (4) of the ICC Statute

In light of the principle *lex specialis derogat legi generali* (a more specific law outweighs a more general law) the Trial Chamber rejected the Prosecution's request that the statements should alternatively be admitted pursuant to Art. 69(2) and (4) of the ICC Statute.[247] In the view of the Chamber, applying Art. 69 of the ICC Statute would circumvent Rule 68, which it considered to be the applicable law for the admission of prior recorded testimony.[248]

11. Assessment of the authenticity, relevance and probative value of the prior recorded testimonies *vis-à-vis* the prejudice to the accused (Art. 69(4) of the ICC Statute)

In addition to its assessment of the requirements under amended Rule 68, the Trial Chamber chose to evaluate whether the prior recorded testimonies were admissible pursuant to the criteria of Art. 69(4) of the ICC Statute. This would require an analysis of the authenticity, relevance and probative value of the prior recorded testimonies vis-à-vis the prejudice caused to the accused.[249] The Chamber held that the *prima facie* probative value of the recorded testimonies would outweigh any prejudicial effect to the accused.[250] In this context, the Chamber again highlighted that its evaluation of the admissibility of the testimonies was distinct from the final assessment of their evidentiary weight for the purpose of the verdict, which is based on the totality of the evidence.[251]

[243] Ibid., paras. 142-143.
[244] Ibid., para. 143.
[245] Ibid.
[246] Ibid., paras. 146-147.
[247] Ibid., paras. 148-149.
[248] Ibid., para. 149.
[249] Ibid., para. 150.
[250] Ibid., para. 151.
[251] Ibid.

12. The majority's decision

For these reasons, the majority of the Trial Chamber admitted into evidence the prior recorded testimony of four witnesses pursuant to Rule 68(2)(d) and the prior recorded testimony of one witness pursuant to Rule 68(2)(c). It rejected the admission of the prior recorded testimony of one witness under Rule 68(2)(d).[252]

13. Separate partly concurring opinion of Judge Eboe-Osuji

Judge Eboe-Osuji concurred with the majority of Trial Chamber V(a) but opined on the fact that the majority did not consider some additional documents which the OTP had attached to its application.[253] He emphasized the considerable scope of the additional evidential materials submitted by the OTP in support of its request, observing that the Prosecution added about 1,669 pages as "needlessly accumulative evidence"[254] on witness interference.[255] He reiterated the Trial Chamber's warning "against making the ultra-indictment complaint of witness tampering a central focus of this trial."[256] In his opinion, the OTP's reliance on the Chamber's Decision No. 4 on the Conduct of Proceedings was "entirely misplaced"[257] since the objective of the Decision "was never to facilitate evidence dumping."[258] Judge Eboe-Osuji furthermore concurred in the outcome of the majority's decision to admit prior recorded testimony for the truth of its contents.[259]

Judge Eboe-Osuji however differed with the other judges in three aspects. In his opinion, neither the old nor the amended version of Rule 68 would be applicable to the present case.[260] Emphasizing the ordinary meaning of the notion, he observed that the term testimony would not cover out-of-court statements that were not made under oath or solemn affirmation in lieu of oath.[261] Judge Eboe-Osuji considered that all out-of-court statements should be admitted for the truth of their contents pursuant to Art. 69(3) of the ICC Statute instead.[262] In his view, "article 69(3) is a very important expression of the plenitude of a Trial Chamber's incidental jurisdiction to do justice in the case, by admitting necessary evidence in the interest of justice, beyond any limitations that may be inherent in the Rules of Procedure and Evidence, and particularly in the context of the tabulated categories indicated in [R]ule 68."[263] Judge Eboje-Osuji stressed that applying Art. 69(3) of the ICC Statute would be warranted by the particular circumstances of the present case, namely the "conducts capable of creating a dissuasive atmosphere for Prosecution

[252] Ibid., pp. 54-55.
[253] Separate, Partly Concurring Opinion of Judge Eboe Osuji, 19 August 2015, ICC-01/09-01/11-1938-Anx-Red, para. 1.
[254] Ibid., para. 13.
[255] Ibid., paras. 3-6.
[256] Ibid., para. 8.
[257] Ibid., para. 11.
[258] Ibid., para. 11.
[259] Ibid., para. 1.
[260] Ibid., paras. 2, 18.
[261] Ibid., paras. 19-24.
[262] Ibid., paras. 27-31.
[263] Ibid., para. 28. See also ibid., para. 30.

witnesses,"[264] which interfere with the interests of justice.[265] The decision would thus not necessarily create a precedent for future cases.[266] To protect the interests of the accused, he added that the prior recorded testimony of those witnesses who had testified in court may be considered for the truth of their contents "only to the extent that they have already been admitted onto the record for purposes of assessing the credibility of those witnesses in the context of the Prosecution's application to declare them hostile."[267] Judge Eboe-Osuji noted in this regard that the OTP had a fair opportunity to question the witnesses under oath on their out-of-court statements and the Defense was accorded the opportunity to examine most of the witnesses in response.[268]

Article 69 of the ICC Statute: 'Evidence' (excerpt)

3. [...] The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

VII. The Appeals Chamber's reversal

The Defense for Ruto and Sang sought leave to appeal the decision of the Trial Chamber, arguing that the lower Chamber had committed an error of law which materially affected the decision.[269] The Prosecution opposed the request.[270] On 10 September 2015, the Trial Chamber granted them leave to appeal on the following seven issues:[271]

(1) Whether applying Rule 68 breaches Art. 24(2) and Art. 51(4) of the ICC Statute;
(2) Whether written statements and transcripts of interviews taken according to Rules 111 and 112 of the ICC Rules can be considered as "prior recorded testimony" under Rule 68(2)(c) and (d), to be admitted for the truth of their contents;
(3) Whether written statements and transcripts of interviews taken according to Rules 111 and 112 of the ICC Rules can be introduced in their entirety under Rule 68(2)(c) and (d);
(4) Whether the Trial Chamber erred in its assessment of the concept of "failure to give evidence with respect to a material aspect" under Rule 68(2)(c) and (d);
(5) Whether the Trial Chamber applied the correct standard of proof in its assessment of the requirements under Rule 68(2)(c) and (d), in particular in relation to the evaluation of the existence of "interference";

[264] Ibid., para. 44.

[265] Ibid., paras. 32-44.

[266] Ibid., para. 31.

[267] Ibid., para. 2.

[268] Ibid., para. 48.

[269] Ruto Defense, application of 26 August 2015, ICC-01/09-01/11-1940-Red; Sang Defense, request of 25 August 2015, ICC-01/09-01/11-1939-Red. See Art. 82 and Art. 83(2) of the ICC Statute.

[270] OTP (ICC), consolidated response of 31 August 2015, 01/09-01/11-1945-Conf.

[271] TC V(a) (ICC), decision of 10 September 2015, ICC-01/09-01/11-1953-Red-Corr. The following enumeration reproduces the wording of the Trial Chamber almost verbatim for the sake of clarity; ibid., para. 20.

(6) Whether the Trial Chamber erred in its interpretation and/or application of the concepts of "indicia of reliability" and "acts and conducts of the accused" under Rule 68(2)(c) and (d); and
(7) Whether the Trial Chamber erred in its assessment of "interests of justice" under Rule 68(2)(d).[272]

The Trial Chamber considered that these issues would significantly impact the fairness and expeditiousness of the proceedings, and observed that a reversal of its decision to admit the prior recorded testimonies "would have a significant bearing on the outcome of the trial."[273] Ruto and Sang filed their respective appeals on 5 October 2015.[274] The African Union supported the appeal of Ruto and Sang in its *amicus curiae* observations on the first issue pursuant to Rule 103 of the ICC Rules.[275] The *amicus curiae* standing of the African Union was granted on 12 October 2015.[276] The Appeals Chamber considered the observations of the African Union to be potentially relevant for the determination of the first issue on appeal.[277] The requests of the Government of the Republic of Kenya, the Government of Namibia and the Government of Uganda to make *amicus curiae* submissions particularly on the negotiating process leading to the amendment of Rule 68 were rejected in that same decision. The Appeals Chamber considered their observations to be duplicative of those of the African Union.[278] The Prosecution and the Defense for Sang submitted responses to the *amicus curiae* observations of the African Union.[279] On 26 October 2015, the Prosecution and the Common Legal Representative for Victims filed their respective responses against the appeals of the Defense for Ruto and Sang.[280]

Rule 103 of the ICC Rules: '*Amicus curiae* and other forms of submission'

1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.
2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.
3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

[272] Ibid.

[273] Ibid., paras. 22, 25.

[274] Ruto Defense, appeal of 6 October 2015, ICC-01/09-01/11-1981-Red; Sang Defense, appeal of 13 October 2015, ICC-01/09-01/11-1982-Red.

[275] AU, observations of 19 October 2015, ICC-01/09-01/11-1988.

[276] AC (ICC), decision of 12 October 2015, ICC-01/09-01/11-1987.

[277] Ibid., para. 16.

[278] Ibid., paras. 17-18.

[279] OTP (ICC), response of 26 October 2015, ICC-01/09-01/11-1992; Sang Defense, response of 26 October 2015, ICC-01/09-01/11-1993.

[280] OTP (ICC), consolidated response of 3 November 2015, ICC-01/09-01/11-1994-Red; Common Legal Representative for Victims, consolidated response of 26 October 2015, ICC-01/09-01/11-2023.

No oral hearings were conducted[281] and the Appeals Chamber[282] issued its 37-page long judgment on 16 February 2016.[283] It unanimously reversed the Trial Chamber's decision to the extent that it admitted prior recorded testimony under amended Rule 68 for the truth of its contents.[284] In the following, the reasoning of the Appeals Chamber will be described, combined with an overview of the main arguments submitted by the parties[285] in the appeals proceedings.

1. No error in the Trial Chamber's assessment of the drafting history

The Sang Defense and the African Union submitted that the Trial Chamber had erred by having failed to consider that Rule 68 was amended by the ASP based on the understanding that it would not apply to pending cases in the situation in the Republic of Kenya.[286] Applying amended Rule 68 would hence violate the principle of good faith, as was averred by the African Union.[287] In the view of the African Union, the Prosecutor should be held to unilateral commitments made during the negotiations pursuant to Art. 7(3) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986.[288] The African Union further emphasized that the States Parties present at the 12th ASP neither objected to nor refuted the statements given by Kenya, the Federal Republic of Nigeria and the Republic of South Africa at the Plenary. These statements could therefore be regarded as interpretative declarations to be taken into account when interpreting the Rule.[289] The Prosecution contested the submissions by the Sang Defense and the African Union. The OTP *inter alia* submitted to have never given any undertaking, nor would such undertaking have a legal effect on the interpretation of the ICC Rules.[290] The African Union's reliance on the Vienna Convention of 1986 would be incorrect given that the ICC Statute is a treaty solely between States, not between States and an international organization.[291] The Common Legal Representative for Victims also opposed the submissions of the Sang Defense and the African Union, arguing *inter alia* that no rights *in personam* had

[281] AC (ICC), judgment of 16 February 2016, ICC-01/09-01/11-2024, paras. 14-17 (the request for an oral hearing by the Ruto Defense was rejected in light of the extensive submissions that had been filed by the parties and the *amicus curiae*).

[282] The Appeals Chamber was composed of Judge Piotr Hofmánski (Presiding Judge), Judge Silvia Fernández de Gurmendi, Judge Christine Van den Wyngaert, Judge Howard Morrison, and Judge Péter Kovács. Judge Sanji Mmasenono Monageng, who is a member of the Appeals Chamber, had been involved in the negotiations on the amendment to Rule 68 and was excused from hearing the appeal.

[283] AC (ICC), judgment of 12 February 2016, ICC-01/09-01/11-2024.

[284] Ibid., p. 3.

[285] The arguments were to a large extent identical to those raised before the Trial Chamber. The following remarks therefore mention the arguments only insofar as they were referred to by the Appeals Chamber.

[286] AC (ICC), judgment of 12 February 2016, ICC-01/09-01/11-2024, paras. 24-26. AU, observations of 19 October 2015, ICC-01/09-01/11-1988, para. 53; Sang Defense, appeal of 13 October 2015, ICC-01/09-01/11-1982-Red, paras. 14-27; Sang Defense, response of 26 October 2015, ICC-01/09-01/11-1993, para. 3.

[287] AU, observations of 19 October 2015, ICC-01/09-01/11-1988, paras. 54-55; see also AC (ICC), judgment of 12 February 2016, ICC-01/09-01/11-2024, paras. 24-25.

[288] AU, observations of 19 October 2015, ICC-01/09-01/11-1988, paras. 56-57.

[289] Ibid., paras. 58-62.

[290] OTP (ICC), consolidated response of 3 November 2015, ICC-01/09-01/11-1994-Red, paras. 1, 3-10; OTP (ICC), response of 26 October 2015, ICC-01/09-01/11-1992, paras. 4-19.

[291] OTP (ICC), consolidated response of 3 November 2015, ICC-01/09-01/11-1994-Red, paras. 32-33; OTP (ICC), response of 26 October 2015, ICC-01/09-01/11-1992, paras. 11-14.

been granted in relation to the Kenyan cases by the ASP nor would any undertaking form part of the *travaux préparatoires*.[292]

After having outlined the negotiating process of the amendment,[293] the Appeals Chamber rejected the arguments brought forward by the Sang Defense and the African Union. It emphasized the text of the provision, which on its view indicates neither that the amended Rule 68 could not apply to specific cases nor to pending cases.[294] Similarly, the ASP Resolution did not explicitly mention that amended Rule 68 is not applicable to these situations.[295] In the view of the Appeals Chamber, by expressly pointing to Art. 51(4) of the Statute "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."[296] It therefore held that amended Rule 68 may be applied retroactively, if the application is not to the detriment of the suspect or accused.[297]

The Appeals Chamber further noted that no evidence was submitted which supported the existence of an explicit undertaking given by Court officials assuring that amended Rule 68 would not apply to the pending Kenya cases.[298] The available documentary evidence could not convince the Appeals Chamber that the States Parties generally intended that the provision should not apply to pending cases.[299] In support of its finding, and contrary to the submission made by the African Union, the Appeals Chamber considered that Art. 7(3) of the Vienna Convention of 1986 was not applicable to the case.[300] Referring to Art. 1 of the Vienna Convention, it held that the Convention was not applicable to the specific circumstances of the case because the Rome Statute was a treaty between States, not between an international organization and States.[301] Only the State Parties could adopt amendments to the ICC Rules.[302] The Appeals Chamber also did not find any basis to support the arguments made by the African Union that other State Parties had endorsed the alleged statements made *inter alia* by Kenya, either explicitly or tacitly.[303] It cited the United Nations Guide to Practice on Reservations to Treaties of 2011 as authority for holding that the silence of other States Parties should not be interpreted as an implicit approval of an interpretative declaration made by a State Party.[304] The Appeals Chamber accordingly found no error made by the Trial Chamber in concluding that amended Rule 68 was applicable, provided that the requirements of Art. 51(4) were taken into account.[305]

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[292] Common Legal Representative for Victims, consolidated response of 26 October 2015, ICC-01/09-01/11-2023, paras. 32, 36.
[293] AC (ICC), judgment of 12 February 2016, ICC-01/09-01/11-2024, paras. 31-36.
[294] Ibid., para. 38.
[295] Ibid., para. 39.
[296] Ibid.
[297] Ibid.
[298] Ibid., para. 40.
[299] Ibid.
[300] Ibid., para. 41.
[301] Ibid.
[302] Ibid. (referring to Art. 51(2) of the ICC Statute).
[303] Ibid., para. 42.
[304] Ibid.
[305] Ibid., para. 43.

2. No error in relying on Art. 51(4) of the ICC Statute rather than Art. 24(2) of the ICC Statute

The Defense for Ruto and Sang argued that the Trial Chamber had erred in ruling that Art. 24(2) of the ICC Statute applied principally to substantive law, by not applying it to Rule 68, and by holding that Art. 51(4) would be rendered almost redundant if Art. 24(2) were applied to the present case.[306] In contrast, the Prosecution and the Common Legal Representative for Victims averred that the Trial Chamber had not committed an error of law in relying solely on Art. 51(4) of the ICC Statute.[307]

The Appeals Chamber first emphasized that Art. 51(4) specifically regulated those instances when amendments to the ICC Rules should not be applied.[308] It accordingly held that Art. 51(4) was applicable to the case; in the view of the Chamber, this finding would not be contradicted by Art. 24(2) ICC Statute.[309] The Appeals Chamber concurred with the Trial Chamber in noting that Art. 24(2) in principle relates to substantive law, as follows from a reading of the provision as a whole.[310] Since the text of Art. 24(1) explicitly refers to conduct which entails criminal liability, the term "law" in Art. 24(2) would mean the substantive law relating to such conduct.[311] The Appeals Chamber found further support for its interpretation in reading Art. 24(2) in context with Art. 22 and Art. 23 of the ICC Statute, which concern principles that relate to substantive law and by considering that Art. 24(2) is contained in Part 3 of the ICC Statute on "General Principles of Criminal Law".[312] In particular, Art. 51(4) was considered to be the more specific provision compared to Art. 24(2), as regards amendments to the Rules.[313] The ASP's Resolution of November 2013 also mentioned only Art. 51(4) and did not refer explicitly to Art. 24(2).[314] The Chamber also took into account that the wording of Regulation 6(D) of the ICC Regulations, which governs amendments to the ICC Regulations, is similar to that of Art. 51(4) ICC Statute.[315] Based on these considerations, the Appeals Chamber ruled that Art. 24(2) was not applicable to amendments to the Rules and that the Trial Chamber did not commit an error in considering Art. 51(4) ICC Statute to be the appropriate provision in the circumstances of the case.[316]

[306] Ibid., para. 66. See Ruto Defense, appeal of 6 October 2015, ICC-01/09-01/11-1981-Red, paras. 8-22; Sang Defense, appeal of 13 October 2015, ICC-01/09-01/11-1982-Red, paras. 13, 28-35.

[307] OTP (ICC), consolidated response of 3 November 2015, ICC-01/09-01/11-1994-Red, paras. 5-22; Common Legal Representative for Victims, consolidated response of 26 October 2015, ICC-01/09-01/11-2023, paras. 3-8; Common Legal Representative for Victims, response of 26 October 2015, ICC-01/09-01/11-1995, paras. 3-6.

[308] AC (ICC), judgment of 12 February 2016, ICC-01/09-01/11-2024, para. 67.

[309] Ibid., paras. 68-69.

[310] Ibid., para. 70.

[311] Ibid.

[312] Ibid., para. 71.

[313] Ibid., paras. 68, 72.

[314] Ibid., para. 72.

[315] Ibid.

[316] Ibid., para. 73.

3. The application of amended Rule 68 is retroactive and to the detriment of the accused

The Defense for Ruto and Sang argued that the Trial Chamber erred in ruling that the application of amended Rule 68 was neither retroactive nor detrimental pursuant to Art. 51(4) of the ICC Statute.[317] They *inter alia* submitted that the abstract determination of detriment conducted by the Trial Chamber was erroneous.[318] The Ruto Defense averred that the Trial Chamber erred in assessing whether detriment existed as part of its consideration of the "interests of justice" requirement under Rule 68(2)(d)(i). By holding that the admission would not be "unduly detrimental,"[319] the Trial Chamber allegedly found that detriment had occurred, which would show that Art. 51(4) was offended.[320] In contrast, both the Prosecution and the Common Legal Representative argued that the Trial Chamber did not commit an error of law in its interpretation of Art. 51(4) of the ICC Statute.[321]

The Appeals Chamber recalled that Art. 51(4) of the ICC Statute shall not be applied retroactively to the detriment of the accused, and then examined whether the Trial Chamber had committed an error in assessing these requirements in this case.[322] The Appeals Chamber rejected the Trial Chamber's narrow interpretation of "detriment," which was based on prejudice to the rights of the accused.[323] The Appeals Chamber concluded that this limited definition could not be inferred from the ordinary meaning of "detriment," which according to the Appeals Chamber includes "disadvantage, loss, damage or harm,"[324] nor could the wording of Art. 51(4) indicate that it should only refer to such rights.[325] The Chamber further observed that unlike Art. 51(4) of the ICC Statute, the equivalent rules of the ICTY and ICTR specifically mention the term "rights" of the accused.[326]

In the view of the Appeals Chamber, "the term 'detriment' should be interpreted in a broad manner and not be confined to prejudice to the rights of the person who is being prosecuted."[327] Accordingly, the Chamber specified that detriment means, "disadvantage, loss, damage or harm to the accused including, but not limited to, the rights of that person."[328] However, the Chamber clarified that there were some limits to what sort of disadvantage could qualify as "detriment" under Art. 51(4) of the ICC Statute.[329] "Detriment" within the meaning of Art. 51(4) would need to reach a certain threshold, "which is that the

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[317] Ibid., paras. 50-56. Ruto Defense, appeal of 6 October 2015, ICC-01/09-01/11-1981-Red, paras. 23-42; Sang Defense, appeal of 13 October 2015, ICC-01/09-01/11-1982-Red, paras. 38-52.

[318] Ruto Defense, appeal of 6 October 2015, ICC-01/09-01/11-1981-Red, paras. 32, 36; Sang Defense, appeal of 13 October 2015, ICC-01/09-01/11-1982-Red, para. 43.

[319] TC V(a) (ICC), decision of 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2, paras. 60, 81, 111, 128.

[320] Ruto Defense, appeal of 6 October 2015, ICC-01/09-01/11-1981-Red, paras. 34-35.

[321] OTP (ICC), consolidated response of 3 November, ICC-01/09-01/11-1994-Red, paras. 35-88; Common Legal Representative for Victims, consolidated response of 26 October 2015, ICC-01/09-01/11-2023, paras. 9-11, 28-33.

[322] AC (ICC), judgment of 12 February 2016, ICC-01/09-01/11-2024, para. 74.

[323] Ibid., para. 76

[324] Ibid.

[325] Ibid., paras. 76-78.

[326] Ibid., para. 77.

[327] Ibid., para. 78.

[328] Ibid.

[329] Ibid.

overall position of the accused in the proceedings be negatively affected by the disadvantage."[330] According to the Appeals Chamber, this assessment requires a determination of "the point in time at which the procedural regime governing the proceedings became applicable to the parties, in particular the accused."[331] The Appeals Chamber noted that a "clear procedural regime"[332], which included the rules applicable to the introduction of witnesses the OTP intends to call pursuant to Rule 76(1) of the ICC Rules, was established at the beginning of the trial, namely through decisions on the conduct of the proceedings rendered by the Trial Chamber.[333] Since the matter of dispute concerned the application of a provision governing the introduction of evidence at trial, the starting date of the trial was considered to be the appropriate point in time at which to determine "retroactivity."[334] The regime pertaining to the admission of prior recorded testimony in the case against Ruto and Sang was considered to have changed while the trial was already on-going, through the amendment of Rule 68 in November 2013.[335] The Appeals Chamber therefore found that it was applied retroactively within the meaning of Art. 51(4).[336]

The Appeals Chamber then examined whether the Rule was applied to the detriment of the accused in the case.[337] It first rejected the Prosecution's argument that the challenged evidence would have been admissible for the truth of its contents even before the amendment entered into force, according to Art. 69(2) and (4) or Art. 69(3) of the ICC Statute.[338] The Chamber highlighted that Rule 68, which it considered to be "[t]he most relevant provision [in respect of 'the introduction of documents or written transcripts"] in the Rules of Procedure and Evidence,"[339] was an exception to the principle of orality, which is enshrined in Art. 69(2) of the ICC Statute.[340] It reiterated a previous finding, made in the context of the previous Rule 68 in the *Bemba* case, which required a cautious approach in deviating from the principle of orality to ensure that the measure is neither prejudicial nor inconsistent with the rights of the accused or with the fairness of the trial generally.[341] The Appeals Chamber observed that for specific instances, Rule 68 sets out particular requirements that have to be fulfilled for prior recorded testimony to be admissible. If these requirements were not met, it would not be permissible to make recourse to Art. 69(2) and (4) of the ICC Statute. Otherwise, Rule 68 would not only be rendered "meaningless"[342], but would also allow the requesting party "to avoid the stringency of [Rule 68]."[343] The Appeals Chamber was furthermore not persuaded by the Prosecution's submission that the Trial Chamber would have permitted

[330] Ibid.
[331] Ibid., para. 79.
[332] Ibid., para. 80.
[333] Ibid.
[334] Ibid., para. 81.
[335] Ibid.
[336] Ibid.
[337] Ibid., para. 82.
[338] Ibid.
[339] Ibid., para. 84 (referring to an earlier judgment rendered by the Appeals Chamber in the *Bemba* case, AC (ICC), judgment of 3 May 2011, ICC-01/05-01/08-1386, para. 77).
[340] Ibid.
[341] Ibid., para. 85 (referring to AC (ICC), judgment of 3 May 2011, ICC-01/05-01/08-1386, para. 78).
[342] Ibid., para. 86.
[343] Ibid., para. 86.

the introduction of the prior recorded testimony under Art. 69(3) of the ICC Statute.[344] The respective request by the OTP was considered to be "wholly speculative"[345] since neither had the Trial Chamber addressed whether the evidence could have been introduced under Art. 69(3), nor had the OTP requested such relief from the Trial Chamber.[346]

The Appeals Chamber found fault with the Trial Chamber's predominantly abstract evaluation of detriment. Since Art. 51(4) explicitly mentions the application of an amendment to the ICC Rules, assessing whether there was detriment pursuant to Rule 68 would require not only an analysis of the amended provision, but also an analysis of the manner in which the law was applied in this case.[347] Both Ruto and Sang had argued before the Trial Chamber and the Appeals Chamber that the application of amended Rule 68 was detrimental to them.[348] In its assessment, the Appeals Chamber first noted that the prior recorded testimonies would not have fallen under old Rule 68 and could have only been admitted through oral testimony.[349] The witnesses whose prior recorded testimonies were admitted under Rule 68(2)(d) recanted their previous statements in court. The Appeals Chamber considered 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,"[350] regardless of the OTP having given notice of a possible application under amended Rule 68.[351] The Appeals Chamber found that "even if the accused had an opportunity to question the witnesses because they appeared before the Court, in the absence of the Prosecution eliciting incriminating evidence from the witnesses in examination-in-chief, such questioning does not amount to a meaningful cross-examination."[352] The Chamber in this context emphasized the importance of the principle of orality, the right to cross-examine witnesses and the negative effect "that depriving the accused of the opportunity to challenge evidence [could] have on the fairness of the proceedings."[353] Overall, the Appeals Chamber noted that the following disadvantages were caused to the accused through the application of amended Rule 68: "(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."[354] The Appeals Chamber therefore ruled that the application of amended Rule 68 had

[344] Ibid., para. 87.
[345] Ibid.
[346] Ibid.
[347] Ibid., para. 88.
[348] Ibid., para. 89.
[349] Ibid., paras. 91-92.
[350] Ibid., para. 93.
[351] Ibid.
[352] Ibid.
[353] Ibid., para. 94.
[354] Ibid., para. 95.

"negatively affected the overall position"[355] of the accused in the proceedings, and held that the Trial Chamber had applied amended Rule 68 retroactively to the detriment of the accused.[356]

4. Reversal of the Trial Chamber's decision

The Appeals Chamber ruled that the Trial Chamber had "committed legal errors in interpreting the notion of detriment too narrowly, in finding that the rule had not been applied retroactively and in finding that this had not been detrimental to the accused."[357] In the view of the Appeals Chamber, these errors materially affected the decision since the prior recorded testimony would not have been admissible otherwise.[358] Given that the Appeals Chamber granted the first ground of appeal, it did not need to address the other grounds of appeal.[359] In accordance with Rule 158(1) of the ICC Rules, the Appeals Chamber decided to reverse the decision of the Trial Chamber insofar as it admitted the prior recorded testimony for the truth of its contents pursuant to Rule 68 of the ICC Rules.[360]

VIII. Concluding observations

Allegations of witness interference have given reason for concern in the Kenyan situation before the ICC. The appeals judgment shows that particularly in such circumstances, truth-finding may not be exercised at all cost and introducing prior recorded testimony must respect the fair trial rights of the accused, which are a cornerstone of the criminal justice process.[361] The Appeals Chamber's interpretation of Art. 51(4) of the ICC Statute emphasized the fairness aspect of the proceedings in ruling that the application of amended Rule 68 had been retroactive and to the detriment of the accused. While amended Rule 68 could thus not be applied in this case, the decision does not impede the application of the Rule in other cases affected by witness tampering, provided that the respective trial has started after the adoption of the amendment.

1. Review of key findings

The judgment of the Appeals Chamber addresses several issues that are of relevance even beyond the particular case. The Appeals Chamber for example determined the respective scopes of application of Art. 51(4) and Art. 24(2) of the ICC Statute concerning the non-retroactivity of procedural and substantive law. It furthermore ruled that Rule 68 is the key provision governing the admission of prior recorded testimony, which may not be circumvented by relying on Art. 69(2) and (4) of the ICC Statute. The Appeals Chamber did not hold that Rule 68, as amended, is *per se* detrimental to the accused.[362] Its

[355] Ibid.

[356] Ibid.

[357] Ibid., para. 96.

[358] Ibid.

[359] Ibid.

[360] Ibid., para. 98.

[361] They are enshrined in Art. 67 of the ICC Statute, applicable qua Art. 21(3) of the ICC Statute, and explicitly referred to in amended Rule 68.

[362] The law and practice of the ICTY, which influenced the amendment of Rule 68, and several domestic jurisdictions as well as human rights jurisprudence indeed seem to support the finding that the admission of prior inconsistent statements of tampered or

analysis rather focused on the *application* of the Rule in the specific circumstances of the case. This approach differs in several aspects from that chosen by the Trial Chamber, which conducted an abstract assessment of the provision's impact on the rights of the accused and considered effects of the application of the Rule only as part of the determination whether the admission of the particular prior recorded testimony was "in the interests of justice"[363].

As the Appeals Chamber acknowledged, Rule 68 is an exception to the central principle of orality and may affect the fair trial rights of the accused and the overall fairness of the proceedings especially if untested incriminating evidence is admitted. It therefore rightly emphasized the need for a cautious approach in applying amended Rule 68.[364] The finding of detriment through comparing the accused's position under the old and the new Rule 68 is quite straightforward. However, the Chamber also raised the issue of the effectiveness of the possibility to challenge the witnesses who recanted incriminating aspects of their previous statements during testimony in court. Whereas the Trial Chamber considered the possibility of the Defense to question the witnesses as sufficient to safeguard the right to confrontation, the Appeals Chamber held that this opportunity was unsatisfactory in the case. It highlighted the importance of *meaningful* cross-examination by the Defense in the circumstances of the case. Assuming that the content of witness testimony is influenced by the specific questions asked, effective cross-examination is indeed vital for the truth-finding process.[365] The right to confrontation furthermore gained particular relevance in the present circumstances as the statements were of central importance to the OTP's case.[366]

The relevance of the Appeals Chamber's evaluation of the applicability of amended Rule 68 for other trials depends on a trial's starting date.[367] The judgment addresses the applicability of amended Rule 68 in the context of trials that had commenced before 27 November 2013, when the amendment was adopted by the ASP. Pursuant to Art. 51(4) of the ICC Statute, amended Rule 68 is evidently applicable to trials which have begun after 27 November 2013 (in any event, to those trials in which the respective Trial Chamber issued its decision on the applicable procedural regime after that date). Only if a trial has begun prior to November 2013 – as did the one against Ruto and Sang – must the application of amended Rule 68 not be retroactive and detrimental to the accused under Art. 51(4) of the ICC Statute, as was defined by the Appeals Chamber.

The criteria of amended Rule 68 were controversially discussed by the parties, in particular which materials would fall under the provision, the "indicia of reliability," and whether the admission was "in the interests of justice". The Trial Chamber defined the requirements of amended Rule 68(2)(c) and (d), referring frequently to jurisprudence of the ICTY. In the interpretation of "prior recorded testimony," the

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unavailable witnesses for the truth of their content may under certain circumstances be permissible even if they go to the acts and conduct of the accused. See e.g., ICTY (AC), Popović et al., decision of 1 February 2008, para. 31; for a detailed discussion see F Gaynor, Admissibility of Documentary Evidence, in: Sluiter et al. (eds.), International Criminal Procedure: Principles and Rules (OUP 2013), 1044, at 1051-1052, 1071-1074.

[363] Rule 68(2)(d)(i) of the ICC Rules.

[364] AC (ICC), judgment of 12 February 2016, ICC-01/09-01/11-2024, para. 84 (confirming AC (ICC), Bemba, judgment of 3 May 2011, ICC-01/05-01/08-1386, para. 78).

[365] J Jackson and S Summers, The Internationalisation of Criminal Evidence (CUP, 2012), 363-364.

[366] But see the more lenient jurisprudence by the European Court for Human Rights, ibid., 358-359.

[367] See also https://thehaguetrials.co.ke/article/icc-appeals-chamber-rejects-use-recanted-evidence-ruto-and-sang-case (29.02.2016).

majority differed from Judge Eboe-Osuji, who favored a narrow reading of "testimony." The Trial Chamber's rulings were however not confirmed by the Appeals Chamber, which already granted the first count of appeal and reversed the decision without discussing the interpretation of the precise requirements of the amended Rule.

Summary of the key findings of the Appeals Chamber:

Both the Trial Chamber and the Appeals Chamber considered that **alleged undertakings** given by Court officials and **statements by some States Parties** at the 12th ASP **did not bar the application of amended Rule 68**. They primarily relied on the text of amended Rule 68 and the ASP Resolution in their analysis.

Art. 51(4) of the ICC Statute governs the **application of amendments** to the ICC Rules whereas Art. 24(2) of the ICC Statute, in principle, deals with non-retroactivity of substantive criminal law. Art. 24(2) cannot be referred to regarding amendments covered by the ***lex specialis*** of Art. 51(4). The Appeals Chamber upheld the respective ruling by the Trial Chamber.

Rule 68 of the ICC Rules is ***lex specialis*** for the admission of **prior recorded testimony**. **No recourse** can be made to the general admissibility regime under **Art. 69(2) and (4)**. Since Rule 68 is an **exception to the principle of orality**, a cautious assessment is required to ensure that the admission of prior recorded testimony "is not prejudicial to or inconsistent with the rights of the accused and the fairness of the trial"[368].

The Appeals Chamber defined the two cumulative **criteria set out by Art. 51(4)** of the ICC Statute ("retroactive to the detriment of the accused"). It eventually held that the Trial Chamber erred in its interpretation of these requirements.

(1) "**Retroactive**": The procedural regime established at the **beginning of the trial** is the decisive point in time for the determination.

(2) "**Detriment**": The Appeals Chamber favored a **broad understanding** of "detriment", encompassing any "disadvantage, loss, damage or harm"[369], which **negatively affects the "overall position of the accused in the proceedings"**[370] It thus went beyond the purely rights-based analysis of the Trial Chamber. The determination of detriment pursuant to Art. 51(4) requires not only an assessment of the **law in the abstract**, but must take into account the **application of the rule** in the particular circumstances. Since the prior recorded testimony could **not be introduced in that form under the old Rule 68 or Art. 69(2) and (4)** against the accused and the Defense had **no opportunity for meaningful cross-examination** of the witnesses, the Appeals Chamber found that the application of amended Rule 68 was detrimental.

Lastly, the proceedings illustrate that the Court itself is the final and independent arbiter in a case on how provisions are to be interpreted, in line with the accepted methods of interpretation.[371] States Parties may request *amicus curiae* standing in a case to present their views, yet to seek a change in law they are confined by the procedures of the ASP as the rule-making body.

2. Potential impact on the 'no case to answer' motions

As a result of the Appeals Chamber's judgment, the written statements and transcripts of interviews of witnesses having recanted incriminating aspects of these statements in court are not admissible for the truth of their contents *qua* amended Rule 68(2)(c) and (d) of the ICC Rules. The Trial Chamber is bound by the judgment of the Appeals Chamber and must take the ruling into account in deciding on the pending

[368] AC (ICC), judgment of 12 February 2016, ICC-01/09-01/11-2024, para. 85

[369] Ibid. para. 76.

[370] Ibid., para. 78.

[371] G Werle and F Jessberger, Principles of International Criminal Law (3rd edn., OUP 2014), paras. 189-194.

'no case to answer' motions.[372] Whether this situation leads the Trial Chamber to grant the motions because it considers that no reasonable trial chamber could convict on the basis of the evidence presented by the Prosecution remains to be seen in the context of the incriminating evidence as yet admitted into the record.[373] The Trial Chamber's earlier observation that the inadmissibility of the material would significantly affect the outcome of the trial could though indicate that the motions' chances of success have increased due to the Appeals Chamber's ruling.[374] In any case, the Prosecution's evidence base appears to have been significantly weakened as a result of the Appeals Chamber's judgment.

[372] See Art. 83 of the ICC Statute.

[373] On the standard of no case to answer motions at the ICC, see TC V(a) (ICC), decision of 3 June 2014, ICC-01/09-01/11-1334, para. 23.

[374] TC V(a) (ICC), decision of 11 September 2015, ICC-01/09-01/11-1953-Red-Corr, para. 25.

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