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I. THE CASE AGAINST MRS SWANSON DOES NOT FALL WITHIN THE JURISDICTION OF THE COURT PURSUANT TO ARTICLE 19 OF THE ROME STATUTE

1. Art. 19(1) of the Rome Statute states that the ICC shall satisfy itself that it has jurisdiction in any case brought before it. For the Court to have jurisdiction, it must fulfill the jurisdictional parameters of *ratione materiae*, *ratione temporis*, and, *ratione personae* or *ratione loci*.¹
2. The Defense submits that the PTC does not have jurisdiction *ratione materiae* or subject-matter jurisdiction under Art. 5(b) and Art. 7(2)(g) of the Rome Statute as there are no reasonable grounds to believe that contextual and specific elements have been satisfied in the present case.
3. The Defense contends that (A) the contextual elements have not been fulfilled since (1) Attack was not directed against a civilian population and (2) The attack was not committed pursuant to a State or organizational policy and (3) The attack was not widespread or systematic in nature.
4. Additionally, (B) the specific elements have not been fulfilled as (1) The perpetrator did not exercise powers attached to the right of ownership over one or more persons (2) The perpetrator did not cause such person or persons to engage in acts of sexual nature.

I.A. The contextual elements have not been satisfied

I.A.1. The attack was not directed against a civilian population

5. An attack is a course of conduct involving the multiple commission of acts.² There must be an ongoing resistance for a certain duration to satisfy the threshold envisaged in Art. 7(1). For example, in *Ongwen*, the continuous resistance lasted for at least 3 years.³ Here, there is no total resistance from large groups in Esoria except for the three outlier families which only began resisting after the selection process carried out.⁴

¹ ICC, *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 01 April 2010, para. 71.

² Rome Statute, Art. 7(2)(a).

³ ICC, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Trial Judgement, 4 February 2021, para. 2798.

⁴ Facts, para. 13.

I.A.2. The attack was not committed pursuant to a State or organizational policy

6. If the State policy is merely political, it does not fall within meaning of a policy under Art. 7(1) of the Statute.⁵ Here, the assignment plan was aimed at achieving a political goal to create a new State by unifying the Allagan ethnic group.⁶ This plan formalizes sexual relationships between AIF members and the local women by legitimizing children born out of said relationships.

I.A.3. The attack was not widespread or systematic in nature

7. ‘Widespread’ encompasses large-scale attacks, which are massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.⁷ The plan was not carried out collectively with considerable seriousness as there were families actively resisting the assignment — which was effective in stopping the assignment.⁸ The proposal to offer cash incentives was rejected as well,⁹ suggesting the consensual nature of the assignment.
8. The alternative requirement of ‘systematic’ refers to patterns of crimes in the sense of non-accidental repetition of similar criminal conduct on a regular pattern.¹⁰ The decision to send different female residents to live with AIF members resulting from the resistance from three families indicates the lack of an existing pattern being followed but rather amounts to isolated acts.¹¹ Therefore, the Defense submits that the alleged attack was not systematic as it was not conducted in alignment with a regular pattern. Thus, there are no reasonable grounds to believe that the contextual elements of crimes against humanity have been satisfied.

⁵ ICC, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-373, Decision on the confirmation of charges pursuant to Art. 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 213.

⁶ Facts, para. 7.

⁷ ICC, *Situation in the Republic of Kenya*, ICC-01/09-19, Decision pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 95.

⁸ Facts, para. 13.

⁹ Facts, para. 12.

¹⁰ ICC, *The Prosecutor v. Gbagbo*, ICC-02/11-01/11, Decision on the Confirmation of Charges against Laurent Gbagbo, 12 June 2014, para. 223.

¹¹ Facts, para. 13.

I.B. The specific elements of crimes against humanity are not satisfied

I.B.1. The perpetrator did not exercise powers attached to the right of ownership over one or more persons

9. The ‘exercise of the right of ownership over a person’ encompasses deprivation of liberty.¹² This includes exacting forced labor or reducing a person to servile status without valid consent.¹³
10. *First*, forced labor is defined as ‘all work or service which is exacted from any person under the threat of any penalty and for which the said person has not offered himself voluntarily’.¹⁴ The threat of penalty may include threats or actual physical harm.¹⁵ The Defense submits that despite the alleged imposition of household responsibilities on Ms Porter by Mrs Swanson, Mrs Swanson did not threaten or inflict any physical harm on the former. The latter merely requested and monitored that the household chores were completed. There is no corroborated evidence to suggest that other women assigned to AIF men were subjected to forced labor. Hence, forced labor is not proven.
11. *Second*, servile status is defined as resulting from practice where a woman is given in marriage on payment of consideration in money or in-kind to parents.¹⁶ Presently, there was no consideration given for the assignment of women to AIF member as Mrs Swanson emphasized that the giving of incentives would negate consent,¹⁷ and she insisted on the arrangement being consensual.¹⁸ Hence, in the absence of such consideration for the handing over of the women in Esoria, they were not reduced to servile status at any point in time.
12. *Third*, there was valid consent.¹⁹ In *Katanga*, the victim was compelled to marry, live with him on orders of superior, feared him and thought that she might escape but was unable to do so.²⁰

¹² Elements of Crimes, Art. 7(1)(c), elements 1.

¹³ Elements of Crimes, footnote 18.

¹⁴ International Labour Organization Convention No. 29, Art. 2(1), Protocol of 2014 to the Forced Labour Convention, 1930, Art. 1(3).

¹⁵ International Labour Organization Convention No. 29, Art. 2(1), Protocol of 2014 to the Forced Labour Convention, 1930, Art. 1(3).

¹⁶ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, Art. 1(c).

¹⁷ Facts, para. 12.

¹⁸ Facts, para. 10.

¹⁹ ICTY, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23-T and IT-96-23/1-A, Judgement, 12 June 2002, para. 121.

²⁰ ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, para. 1004.

Here, Ms Porter's mother consented to her daughter living with Mr Swanson.²¹ Despite being given a key, Ms Porter never made any attempts to escape from the alleged confinement. Therefore, the Defense submits that no powers attaching to rights of ownership were exercised.

I.B.2. The perpetrator did not cause such person or persons to engage in acts of sexual nature

13. Acts of sexual nature include those inflicted upon the physical and moral integrity of a person by means of coercion or threat of force.²² The sexual relationship between Ms Porter and Mr Swanson was already taking place even before Mrs Swanson moved to Esoria. At no point in time did Mrs Swanson exert coercive pressure or threats of force against Ms Porter to perform any acts of sexual nature. To the contrary, Mrs Swanson's act of moving Ms Porter to a bedroom separate from Mr Swanson suggests her intention of stopping the sexual relations between Mr Swanson and Ms Porter.²³ In short, causation cannot be established.

II. MRS SWANSON IS NOT CRIMINALLY RESPONSIBLE FOR THE CRIME AGAINST HUMANITY OF SEXUAL SLAVERY UNDER ARTICLE 25(3)(C) OF THE ROME STATUTE

14. The accused's conduct must have a substantial effect or have substantially contributed to the commission of the crime to be found responsible under Article 25(3)(c).²⁴ The accused must have lent his or her assistance with the aim and purpose of facilitating the offense.²⁵

II.A. Mrs Swanson's conduct did not provide substantial effects to the commission of sexual slavery in Esoria

15. The advice provided by Mrs Swanson could not have substantially contributed to the assignment plan in Esoria. Mrs Swanson had merely provided advice to Mr Swanson when asked by her husband in ensuring consent was given freely by the civilians in Esoria,²⁶ to integrate the AIF soldiers,²⁷ and to serve the goal of a united, independent Allagan State.²⁸ Further, the ultimate authority and decision-making power lie in Walter Dean, the commander

²¹ Facts, para. 15.

²² SCSL, *The Prosecutor v. Alex Tambe Brima et al.*, SCSL-2004-16, Judgement, 20 June 2007, para. 720.

²³ Facts, para. 21.

²⁴ ICC, *The Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, para. 280; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04 01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, para. 997.

²⁵ ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Muusamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, Judgment pursuant to Article 74 of the Statute, 19 October 2016, para. 97.

²⁶ Facts, para. 10.

²⁷ Facts, para. 9.

²⁸ Facts, para. 7.

of the AIF brigade that led the charge into Esoria.²⁹ The clear hierarchical structures preclude Mrs Swanson's influence over the decision of the AIF. Since no direct link³⁰ between Mrs Swanson's giving of advice to her husband and the commission of the alleged sexual slavery is established, she cannot be held liable for the alleged sexual slavery. The current situation is contrasted with *Bemba*, where the aider and abettor guilty of aiding the giving of false testimony by the defense witnesses constantly played an active role not just as case manager — but by liaising, advising, and coaching the witnesses.³¹ Mrs Swanson's advice to ensure consent is present was given merely on two occasions, in response to her husband's solicitation of her opinion, in a personal capacity.

16. Liability for aiding and abetting by tacit approval and encouragement may only attach where there exists a legal duty to act and means to fulfill this duty.³² Mrs Swanson is not in any legal position to influence or dictate the military plans or the commission of the alleged sexual slavery in Esoria. Even in the Swanson household, she does not have the legal duty nor the authority or superiority to actively stop the commission of the alleged crime.
17. Liability by omission requires a position of authority in which failure to act has a decisive effect on the commission of the crime, couple with the requisite mens rea.³³ However, at no point in time did Mrs Swanson hold a position of authority that would warrant her mere presence at the scene to be contributory to the commission of the crime. Mrs Swanson had no say in Ms Porter's presence at the Swanson household, believing that her presence was fully consensual. Mrs Swanson's position can be starkly contrasted with that of *Paul Bisengimana* — the appointed *bourgmestre* of Gikoro *commune* — who acknowledged his executive power, administrative authority, and responsibility to ensure peace, public order, and safety in the *commune*.³⁴
18. Mrs Swanson did not provide specific directions which would have a substantial effect on the perpetration of the alleged sexual slavery.³⁵ Aiding and abetting was designed to criminalize a broad swath of conduct beyond physical perpetration of the actus reus.³⁶ Mrs Swanson's

²⁹ Facts, para. 8.

³⁰ ICTY, *Prosecutor v. Momčilo Perišić*, IT-04-81-A, Judgement, 28 February 2013, para. 44.

³¹ ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Muusamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, Judgment pursuant to Article 74 of the Statute, 19 October 2016, para. 10

³² ICTY, *Prosecutor v. Radoslav Brđjanin*, IT-99-36-A, Judgement, 3 April 2007, para. 274.

³³ ICTY, *Prosecutor v. Radoslav Brđjanin*, IT-99-36-A, Judgement, 3 April 2007, para. 273; ICTR, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para. 202; ICTY, *Prosecutor v. Mitar Vasiljevic*, IT-98-32-T, Judgement, 29 November 2002, para. 284.

³⁴ ICTR, *The Prosecutor v. Paul Bisengimana*, ICTR 00-6-T, Judgement and Sentence, 13 April 2006, para. 33.

³⁵ ICTY, *Prosecutor v. Momčilo Perišić*, IT-04-81-A, Judgement, 28 February 2013, para. 36; ICTY, *The Prosecutor v. Dusko Tadic*, IT-94-1-A, Judgement in Appeal, 15 July 1999, para. 50.

³⁶ ICTY, *The Prosecutor v. Dusko Tadic*, IT-94-1-A, Judgement in Appeal, 15 July 1999, para. 191.

conduct must thus include specific directions that link her acts and the crimes committed by the principal perpetrator. The provision of general assistance alone is insufficient to prove that this aid was specifically directed to crimes of the principal perpetrators.³⁷ In *Perišić*, despite the accused providing assistance to the Army of the Republika Srpska pursuant to the Supreme Defense Council's order, such assistance did not amount to providing direction, let alone specific direction. Conversely, evidence showed that the assistance to the army was merely done in the context of general war efforts, which is not a crime under the Statute.³⁸ Similarly, Mrs Swanson had merely provided general assistance in a personal capacity to her husband in ensuring consent is properly obtained and said assistance cannot be held as specific directions to conduct any of the alleged acts.

II.B. Mrs Swanson does not fulfill the mens rea standard of intending to facilitate the commission of sexual slavery

19. Article 25(3)(c) requires a specific 'purpose' requirement which necessitates a higher subjective mental element in which it is insufficient that the accessory merely knows that his or her conduct will assist the principal perpetrator in the commission of the offense.³⁹ Mrs Swanson does not possess the intent to commit sexual slavery, evident by her advice entirely premised on obtaining consent and ensuring all relations are consensual. Mrs Swanson did not intend to keep Ms Porter as a sexual slave, nor does she share the intent with the principal perpetrator in depriving Ms Porter of her sexual liberty.
20. The aider and abettor must have known the of the principal perpetrator's intent to commit the crime.⁴⁰ This knowledge may include the principal perpetrator's state of mind and any relevant specific intent.⁴¹ Throughout the two conversations between Mrs Swanson and Mr Swanson, the latter never indicated that the assignment plan would amount to sexual slavery as the former was merely asked to provide advice on ensuring consent was always obtained.⁴²

³⁷ ICTY, *Prosecutor v. Momčilo Perišić*, IT-04-81-A, Judgement, 28 February 2013, para. 44.

³⁸ ICTY, *Prosecutor v. Momčilo Perišić*, IT-04-81-A, Judgement, 28 February 2013, para. 57.

³⁹ ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Muusamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, Judgment pursuant to Article 74 of the Statute, 19 October 2016, para. 97.

⁴⁰ ICTR, *The Prosecutor v. Paul Bisengimana*, ICTR 00-60-T, Judgement and Sentence, 13 April 2006, para. 36.

⁴¹ ICTY, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Public Redacted Version of Judgement Issued on 24 March 2016, 24 March 2016, para. 577.

⁴² Facts, para. 10.

21. There must be knowledge that the acts of assistance would indeed assist the principal's commission of the crime.⁴³ Mrs Swanson was only informed of the assignment plan intended to integrate the AIF with the civilians and to serve the goal of a united state. She has no knowledge that her advice would assist the specific commission of sexual slavery. Her conduct or omission in the Swanson household was not done in an aider or abettor's capacity. She was merely the wife of the alleged perpetrator, who had no say in the matter and was not in a position of authority over Mr Swanson or the AIF soldiers. Her advice was not given in the context of committing sexual slavery alongside the AIF soldiers.
22. Mrs Swanson must be aware of the essential elements of the crime being committed by the principal.⁴⁴ She could not have reasonably known that the assignment plan amounts to sexual slavery, as consent was constantly emphasised in her conversations with Mr Swanson.⁴⁵ The factor of consent also led her to believe that Ms Porter's presence at the Swanson household was of a voluntary nature. Accordingly, the subjective standard is not proven due to the lack of knowledge and intention to commit the crime of sexual slavery.

III. THE TRANSCRIPT OF MS PORTER'S PRIOR INTERVIEW WITH THE OTP IS NOT ADMISSIBLE AS EVIDENCE UNDER RULE 68 OF THE ICC'S RULES OF PROCEDURE AND EVIDENCE

23. The general principle of orality requires witnesses to appear in person at trial.⁴⁶ This principle is consistent with the fundamental rights of the accused to examine the witnesses testifying against him or her.⁴⁷ In light of this, the ICC ruled that the application of Rule 68 of the Rules of Procedure and Evidence as an exception to the principle of orality is a measure of last resort, and must be cautiously and stringently assessed.⁴⁸ For this exception to apply, one of the sub-rules under Rule 68 must be fulfilled.⁴⁹ The Defense submits that all the sub-rules are not fulfilled.

⁴³ ICTY, *The Prosecutor v. Dusko Tadic*, IT-94-1-A, Judgement in Appeal, 15 July 1999; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Muusamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, Judgment pursuant to Article 74 of the Statute, 19 October 2016, para. 98.

⁴⁴ ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Muusamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, Judgment pursuant to Article 74 of the Statute, 19 October 2016, para. 98; ICTY, *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 4.

⁴⁵ Facts, paras. 10 and 12.

⁴⁶ Rome Statute, Art. 69(2).

⁴⁷ Rome Statute, Art. 67(1)(e).

⁴⁸ ICC, *The Prosecutor v. Paul Gicheru*, ICC-01/09-01/20, Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(d), 14 December 2021, para. 22.

⁴⁹ Rules of Procedure and Evidence, Rule 68(1).

III.A. The OTP and the Defense had no opportunity to examine the witness during the recording⁵⁰

24. During the recording of Ms Porter's interview, only the OTP had the opportunity to examine her. The Defense was absent, and in fact, was not even aware of the interview. As Ms Porter refuses to take the stand as a witness, the Defense also does not have the opportunity to examine her during in-court testimony. Therefore, if this interview was admitted as evidence, it is inconsistent with procedural fairness as Mrs Swanson's fundamental rights to examine Ms Porter who was testifying against her were not upheld.

III.B. The prior recorded testimony goes to proof of the acts and conduct of Mrs Swanson⁵¹

25. Under this sub-rule, if a prior recorded testimony goes to proof of the acts and conduct of the accused, it is inadmissible. The ICC interpreted 'goes to proof of the acts and conduct of the accused' as relating to actions of the accused which are relied upon to establish her criminal responsibility for the crimes charged.⁵² Presently, Ms Porter's interview revolved around her allegations of uncorroborated acts committed by Mrs Swanson. For instance, Mrs Swanson put her into the bedroom next door for Mr Swanson to have easy access to her and forced her to do all the household chores.⁵³ These are acts which will be relied by the OTP to establish her alleged sexual slavery. Therefore, as the interview goes to proof of the acts and conduct of Mrs Swanson, it should be deemed inadmissible.

26. While considering this sub-rule, the Chamber will also take into account factors including: (1) whether the testimony relates to issues that are not materially in dispute, (2) whether the testimony is of a cumulative or corroborative nature which other witnesses will give or have given oral testimony of similar facts and (3) whether the testimony relates to background information.⁵⁴ *First*, since it was proven above that the interview goes to proof of acts and conduct of Mrs Swanson, it naturally follows that the interview **does not merely relate to background information**. *Second*, the interview is **materially disputed** by the Defense because the allegations in the interview have a significant impact on material matters actually contested in the proceedings,⁵⁵ *i.e.*, whether Mrs Swanson committed acts which amounted to

⁵⁰ Rules of Procedure and Evidence, Rule 68(2)(a).

⁵¹ Rules of Procedure and Evidence, Rule 68(2)(b).

⁵² ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, para. 12.

⁵³ Exhibit 1.

⁵⁴ Rules of Procedure and Evidence, Rule 68(2)(b)(i).

⁵⁵ ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, para. 15.

sexual slavery. *Third*, the interview is also **not of cumulative or corroborative nature** as no other witnesses had provided similar testimony on Mrs Swanson's alleged sexual slavery.

27. Lastly, for a prior recorded testimony to be introduced under this sub-rule, it must be accompanied by a declaration by the testifying person that its contents are true and correct to the best of his knowledge and belief.⁵⁶ However, Ms Porter did not make such declaration.

III.C. The prior recorded testimony does not come 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 orally⁵⁷

28. The requirements for this sub-rule are as follows:⁵⁸ (1) the prior recorded testimony comes from a person who has died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally; (2) the necessity of measures under Article 56 of the Rome Statute could not be anticipated; and (3) the prior recorded testimony has sufficient indicia of reliability. The fact that the prior recorded testimony goes to proof of acts and conduct of the accused is a factor against its introduction under this sub-rule.⁵⁹

III.C.1. Ms Porter has not died, must not be presumed dead, and is not unavailable to testify due to obstacles that cannot be overcome with reasonable diligence

29. Ms Porter is evidently alive and cannot be said to have died or be presumed dead. Turning on to her unavailability to testify due to obstacles that cannot be overcome with reasonable diligence, although the term 'unavailable' must be interpreted broadly,⁶⁰ past decisions had always decided it in relation to circumstances out of the witness's control such as the witness being unreachable upon all attempts to locate him,⁶¹ the witness being in detention,⁶² or the

⁵⁶ Rules of Procedure and Evidence, Rule 68(2)(b)(ii).

⁵⁷ Rules of Procedure and Evidence, Rule 68(2)(c).

⁵⁸ Rules of Procedure and Evidence, Rule 68(2)(c)(i).

⁵⁹ Rules of Procedure and Evidence, Rule 68(2)(c)(ii).

⁶⁰ ICC, *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Decision on the Defence's request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules, 16 December 2022, para.21; ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Muusamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13, Decision on 'Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence', 12 November 2015, para. 16.

⁶¹ ICC, *The Prosecutor v. Paul Gicheru*, ICC-01/09-01/20, Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(c), 26 November 2021, para. 14; ICC, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, para. 138.

⁶² 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. 39.

witness being unable to testify due to physical or mental conditions.⁶³ The witness' simple unwillingness to testify is not sufficient.⁶⁴ Presently, Ms Porter's refusal to testify does not fall within any of the above unpreventable circumstances. In fact, her refusal was due to her mere fear of an alleged threat.

30. In addition, Ms Porter's interview does not have sufficient indicia of reliability which will be demonstrated below in the sub-rule of improper interference.⁶⁵ Her testimony also goes to proof of acts and conduct of Mrs Swanson.⁶⁶ Therefore, Ms Porter's interview cannot be introduced under Rule 68(2)(c).

III.D. The prior recorded testimony does not come from a person who has been subjected to interference⁶⁷

31. There are five conjunctive requirements to prove this sub-rule.⁶⁸ The Defense submits that the second to fifth requirements are not fulfilled.

III.D.1. Ms Porter's failure to attend as a witness has not been materially influenced by improper interference

32. In *Ruto and Sang* where the TC held that there was improper interference, the witness himself was being threatened.⁶⁹ However, it is distinguished from our case on hand as the alleged threat did not concern about the safety of Ms Porter herself but was towards her son.⁷⁰ Thus, improper interference is not established.
33. Assuming *arguendo* that the alleged threat can amount to improper interference, for it to have 'materially influenced' her refusal to testify, there must first be reasonable apprehension that the threat will lead to imminent harm. Currently, since the raid by AIF had ceased, multinational

⁶³ ICC, *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Decision on the Defence's request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules, 16 December 2022, para. 21; ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Decision on the introduction into evidence of P-0570's prior recorded testimony pursuant to Rule 68(2)(c) of the Rules, 13 July 2021, paras. 12-20.

⁶⁴ ICC, *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, Decision on the Defence's request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules, 16 December 2022, para. 23.

⁶⁵ See III.D.3. below.

⁶⁶ See III.C. above.

⁶⁷ Rules of Procedure and Evidence, Rule 68(2)(d).

⁶⁸ Rules of Procedure and Evidence, Rule 68(2)(d)(i).

⁶⁹ ICC, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, para. 55.

⁷⁰ Facts, para. 18.

force regained control of Esoria and Mrs Swanson was sent back to Allagash,⁷¹ Ms Porter should have been reasonably aware that Mrs Swanson's threat would not cause immediate infliction of harm. Therefore, her failure to attend as a witness was not materially influenced by improper interference.

III.D.2. Reasonable efforts have not been made to secure Ms Porter's attendance as a witness

34. 'Reasonable efforts have been made' shall be interpreted as 'all reasonable efforts must be exhausted'.⁷² In cases where witnesses refused to testify, the Chambers have the power to compel the appearance of witnesses before the Court.⁷³ Therefore, in *Paul Gicheru*, the ICC held that not all reasonable efforts to secure the witness' attendance had been exhausted as a summons for his attendance had not been served.⁷⁴
35. Similarly in our case, there is no indication of any summons having been requested by the OTP to be served on Ms Porter to compel her attendance upon her refusal to take the stand. Bearing in mind that introduction of a prior recorded testimony under Rule 68(2)(d) is a measure of last resort and must be cautiously and stringently assessed,⁷⁵ it must be concluded that reasonable efforts have not been made to secure Ms Porter's attendance as a witness.

III.D.3. Interests of justice are not best served by the prior recorded testimony being introduced

36. The considerations of the ICC when determining whether the interests of justice are best served is whether the prior recorded testimony relates to the acts and conducts of the accused⁷⁶ and whether the Defense was able to cross-examine the witness in the court.⁷⁷ As proven above, both factors are against the introduction of Ms Porter's interview.⁷⁸ Therefore, if Ms Porter's interview was introduced, it would amount to a deprivation of Mrs Swanson's procedural right

⁷¹ Facts, para. 24.

⁷² ICC, *The Prosecutor v. Paul Gicheru*, ICC-01/09-01/20, Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(d), 14 December 2021, para. 22.

⁷³ ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11 OA 7 OA 8, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Part Cooperation, 9 October 2014, para. 113.

⁷⁴ ICC, *The Prosecutor v. Paul Gicheru*, ICC-01/09-01/20, Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(d), 14 December 2021, para. 24.

⁷⁵ ICC, *The Prosecutor v. Paul Gicheru*, ICC-01/09-01/20, Decision on the Prosecution's Request to Admit Prior Recorded Testimony under Rule 68(2)(d), 14 December 2021, para. 22.

⁷⁶ Rules of Procedure and Evidence, Rule 68(2)(iv); ICC, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, para. 60.

⁷⁷ ICC, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, para. 60.

⁷⁸ See above at III.A. and III.B.

as the allegations in the interview would be used against her while depriving her of the opportunity to cross-examine it.

III.D.4. The prior recorded testimony does not have sufficient indicia of reliability

37. The ICC ruled that (1) the presence of a qualified interpreter, (2) an oath or in alternative, (3) a signature of the statement accompanied by a declaration that the testimony is true to the best of the witness's knowledge are factors of consideration when assessing the indicia of reliability.⁷⁹ Presently, all the above factors are not present. Additionally, in Ms Porter's interview, she was unable to point out several simple facts, including her age during the 2020 takeover.⁸⁰ There were also contradictions in her statement where she testified that both her parents gave her away to Mr Swanson despite her father having already passed away. Hence, Ms Porter's interview lacked sufficient indicia of reliability.

III.E. Ms Porter would not be present before the Chamber and there is no opportunity for the OTP, Defense, and Chamber to examine her during the proceedings⁸¹

38. Since Ms Porter refused to take the stand as a witness, there is no opportunity to examine her during the proceedings, causing this sub-rule to fail. The failure of all the sub-rules under Rule 68 amounts to the inadmissibility of Ms Porter's interview as evidence.

IV. PRAYER OF RELIEF

39. In light of the above arguments, the OTP respectfully requests the Court to find that:

- I. The case against Mrs Swanson does not fall within the jurisdiction of the ICC;
- II. Mrs Swanson is not criminally responsible for the crime against humanity of sexual slavery under Art. 25(3)(c) of the Rome Statute.
- III. The transcript of Ms Porter's prior interview is not admissible as evidence under Rule 68 of the ICC's Rules of Procedure and Evidence.

⁷⁹ ICC, *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, para. 65.

⁸⁰ Exhibit 1.

⁸¹ Rules of Procedure and Evidence, Rule 68(3).