

Separate Opinion of Judge Raul C. Pangalangan

1. I join the majority in the conclusions contained in its decision of 11 November 2015.¹ However, I am constrained to write separately solely on the reasoning that pertains to the retroactive application of the amended Rule 68, which provides additional instances for the use of “prior recorded testimony” made by an absent or unavailable witness.
2. The Statute allows this only by way of exception to the general rule that witnesses shall testify in person before the Court² and to the right of the accused to confront the witnesses against him or her.³ The Statute carves out an exception and allows the Court to receive prior recorded testimony “subject to this Statute and in accordance with the Rules of Procedure and Evidence” provided “[t]hese measures [are not] prejudicial to or inconsistent with the rights of the accused.”⁴
3. That exception is carried out by Rule 68 of the Rules of Procedure and Evidence, allowing the use of “prior recorded testimony.” This Rule was amended on 27 November 2013, “expanding it to include other avenues for admitting prior recorded testimony in order to facilitate the expeditiousness and efficiency of proceedings.”⁵

¹ Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests, 11 November 2015, ICC-01/05-01/13-1478-Red-Corr (corrigendum notified 12 November 2015) (“Majority Decision”).

² Article 69(2) of the Statute (“The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth [...] in the Rules of Procedure and Evidence. The Court may also permit ... 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.”).

³ Article 67(1)(e), (i) of the Statute (“In the determination of any charge, the accused shall be entitled to ... a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: [...] (e) To examine, or have examined, the witnesses against him or her [...]; (i) Not have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.”).

⁴ Article 69(2) of the Statute.

⁵ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Public Redacted Version of Corrigendum: Decision on Prosecution Request for Admission of Prior Recorded Testimony, 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2 (corrigendum notified 19 August 2015).

4. The original Rule 68 already allowed the introduction of “previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony” even when the witness is “not present before the Trial Chamber.” That same language has been retained in the amended rule, and therefore does not give rise to any issue of retroactivity.
5. Retroactivity comes into play only with regard to the conditions under which such recordings can be admitted into evidence. In the original Rule 68, in case of witnesses not present before the Chamber, the requirement was that “both the Prosecutor and the defence had the opportunity to examine the witness during the recording.”⁶ Accordingly, the original formulation installed a safeguard for the reliability of the testimony, namely, that it had been confronted by the adverse party.
6. That has been retained under the 2013 amendments as Rule 68(2)(a) of the Rules. However the 2013 amendments recognise three instances when the Court may allow prior recorded testimony made by a witness not present before the Chamber, on grounds relating to the importance of the evidence and its impact on the accused (Rule 68(2)(b))⁷; the unavailability of the witness (Rule 68(2)(c))⁸; or “improper interference, including threats, intimidation, or coercion” with the

⁶ The original pre-2013 text of Rule 68 (“[T]he Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that: (a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; ...”).

⁷ Rule 68(2)(b) of the Rules (“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*: [...] The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused.” In such a case, the “Chamber shall consider, *inter alia*, whether the prior recorded testimony in question: relates to issues that are not materially in dispute; is of a cumulative or corroborative nature; relates to background information; is such that the interests of justice are best served by its introduction; and has sufficient indicia of reliability.”) (emphasis supplied).

⁸ Rule 68(2)(c) of the Rules (if the witness “has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally.”).

“physical, psychological, economic or other interests” of the witness (Rule 68(2)(d)).⁹

7. The Prosecution now seeks to introduce the previously recorded testimony of witnesses P-270 and P-264 under the amended Rule 68(2)(b). The Babala Defence objects *ratione temporis* to the application of Rule 68(2), arguing that Articles 24(2)¹⁰ and 51(4)¹¹ of the Statute bar its application because the case had commenced prior to the adoption of the amendment. The majority finds that Rule 68(2) is not being applied retroactively in the present case. I respectfully disagree.
8. *First*, I differ on what it means to say that a rule is being applied retroactively. The majority reasons that the amended rule is here being applied prospectively upon items just now being introduced into evidence:

[T]he use of a procedural provision can only be considered as retroactive in its application when it concerns issues which have been previously ruled upon by the Chamber. This is not the case when a norm is used prospectively, meaning that the application concerns matters that are new before the Chamber and *would not affect already established rights of the defence*. In the present case, the Prosecution seeks to introduce prior recorded testimony of witnesses that have not been subject to any judicial decision by this Chamber. Therefore the application of rule 68 is future-oriented and *does not impair a vested right of the defence*. Accordingly, the Chamber finds that Rule 68(2) is not applied in a retroactive manner in this instance.¹²

9. The application of the amended rule today may indeed be prospective vis-à-vis the moment when the evidence is proffered but it is retroactive vis-à-vis the rights already being enjoyed the accused under the original rule or, in the language of the decision itself, the “already established rights of the defence” or “a vested right of the defence.”

⁹ Rule 68(2)(d) of the Rules (“The prior recorded testimony comes from a person who has been subjected to interference.”).

¹⁰ Article 24 of the Statute (“1. No person shall be criminally responsible under this Statute for conduct *prior to the entry into force* of the Statute. 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.”) (emphases supplied).

¹¹ Article 51(4) of the Statute (“The Rules of Procedure and Evidence [and] amendments thereto [...] shall be consistent with this Statute. 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 or who has been convicted.”).

¹² Majority Decision, ICC-01/05-01/13-1478-Red-Corr, para. 40 (emphases supplied).

10. The mischief sought to be avoided by non-retroactivity is that a right already possessed by the accused is thus taken away by the new rule. Here the critical moment in determining when a rule is being applied retroactively is when the rights vest in the accused, after which it may not be impaired by a supervening rule. The Defence suggests that evidence that was excluded under the original rule would now be allowed under the amended rule. In other words, the accused is now confronted with evidence from which he would have been insulated under the original rule. To that extent, I find that the new rule is being applied retroactively.

11. *Second*, it is of no moment that the amended Rule 68 is available to both parties. The majority finds that Rule 68(2) is “not, on its face, a less favourable law for the accused” and is therefore “neutral with respect to its content and its applicability.” Both statutory guarantees against retroactivity are expressly one-sided. They protect the defendant, not the Prosecution. Article 24(2) protects “the person being investigated, prosecuted or convicted” from the more onerous law. Article 51(4) protects “the person who is being investigated or prosecuted or who has been convicted” from a “detriment” caused by the retroactive application of “[a]mendments to the Rules of Procedure and Evidence.” These clauses are not concerned about the Prosecution at all. They are indifferent to whether the Prosecution may bear the same burden, and are concerned solely on whether an impermissible burden had been shifted to the defence. It is the *permissibility* of that burden, and not its *parity*, that is the concern of both clauses.

12. *Third*, what will make the retroactive application of the 2013 amendment impermissible is whether *on-its-face* the new rule is “less favourable” to the accused under Article 24(2), or whether *as-applied* it causes a “detriment” to the accused under Article 51(4). I agree with the majority that the amended Rule 68 of the Rules may be applied in the present case without contravening either of these provisions.

13. *On-its-face*, the amendment is not necessarily “less favourable” to the accused. The amended rule does recognise additional instances when prior recorded testimony may be allowed. However, it also hedges those instances with safeguards for fairness and reliability, namely, that introducing the prior recorded testimony (1) cannot be “prejudicial to or inconsistent with the rights of the accused” and (2) may be allowed only “after hearing the parties.”
14. Moreover, although the three additional instances were spelled out only in the 2013 amendments, these were amply covered by the broad and general scope of the original rule subject only to the right to confront requirement. What the 2013 amendments does is to recognise those exceptional circumstances when the right to confront is overridden by other factors, e.g., the death or intimidation of a witness. In this sense, the 2013 amendments do not really create new exceptions for allowing prior recorded testimony but – for the three specified instances – merely replace the old safeguard, which was the right to confront, with the new safeguards mentioned above, namely, the rights of the accused and the prior hearing requirement. The Prosecution didn’t get a free pass, just a restricted ticket.
15. In this regard, Article 67 identifies the rights of the accused, including the right “[t]o examine [...] the witnesses against him or her.”¹³ However, the Statute itself creates exceptions to this, e.g., allowing the “recorded testimony of a witness [...] as well as [...] documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence.”¹⁴ Yet, significantly, when the Statute codifies the accused’s rights to certain evidentiary standards, it refers only to the most important, namely, the right “[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.”¹⁵ The amended Rule 68 does not shift any such evidentiary burden to the accused at all, nor does

¹³ Article 67(1)(e) of the Statute.

¹⁴ Article 69(2) of the Statute.

¹⁵ Article 67(1)(i) of the Statute.

it lower the evidentiary threshold. The retroactive application of the amended rule is therefore facially valid under Article 24(2).

16. On the other hand, *as-applied*, the prejudice caused to the accused does not rise to the level of an Article 51(4) detriment. As noted by the majority, the limited nature of P-270 and P-264's prior recorded testimony means that no undue detriment is caused by recognising the formal submission of their statements.¹⁶ These witnesses are only giving statements on receiving payments from persons other than the accused and giving them to Main Case defence witnesses. The interests of justice are served by "formally submitting this kind of basic payments information in a manner which does not absorb valuable court time."¹⁷ The defence teams' own argumentation also suggests that P-270 and P-264's appearances before the Chamber are not strictly necessary.¹⁸
17. In summary, the prior recorded statements of absent witnesses may be introduced by the Prosecution under Rule 68 as amended because, even though the amendment is being applied retroactively, it satisfies the requirements of Articles 24(2) and 51(4).



Judge Raul C. Pangalangan

Dated 16 December 2015

At The Hague, The Netherlands

¹⁶ Similar considerations apply to P-263. Public redacted Decision on "Prosecution Submission of Evidence Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence", 12 November 2015, ICC-01/05-01/13-1481-Red, n. 17 (*ex parte* version notified same day).

¹⁷ Majority Decision, ICC-01/05-01/13-1478-Red-Corr, para. 103.

¹⁸ Majority Decision, ICC-01/05-01/13-1478-Red-Corr, paras 97, 103, 106.