

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13
Date: 12 November 2015

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Raul C. Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF *THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO,
AIMÉ KILOLO MUSAMBA, JEAN-JACQUES MANGENDA KABONGO,
FIDÈLE BABALA WANDU and NARCISSE ARIDO***

Corrigendum of public redacted version of

Decision on Prosecution Rule 68(2) and (3) Requests

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber VII ('Chamber') of the International Criminal Court ('Court' or 'ICC') in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 24(2), 51(4), 67(1)(e), 69(2) and (7) of the Rome Statute ('Statute') and Rules 68(2)(b) and (3) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution Rule 68(2) and (3) Requests'.

I. Procedural History

1. On 14 September 2015, the Prosecution filed a request to admit the prior recorded testimony of one of its witnesses, P-270, pursuant to Rule 68(2)(b) of the Rules ('First Rule 68(2) Request').¹
2. On 17 September 2015, the Office of the Prosecutor ('Prosecution') filed a request to admit the prior recorded testimony of four of its witnesses, P-20, P-243, P-214 and P-272, pursuant to Rule 68(3) of the Rules and subject to the further conditions of admissibility set out in the provision ('Rule 68(3) Request').²
3. On 24 September 2015, the Chamber issued its decision on the Prosecution's request for admission of documentary evidence.³ Therein, it deferred its decision as to whether certain material meets the requirements of Rule 68 of the Rules.⁴

¹ Prosecution Request for the Admission of the Previously Recorded Testimony of P-0270, pursuant to Rule 68(2)(b), ICC-01/05-01/13-1247-Conf. A public-redacted version was filed on 30 September, ICC-01/05-01/13-1247-Red.

² Prosecution Request for the Admission of Previously Recorded Testimony of P-0020, P-0243, P-0214 and P-0272, pursuant to Rule 68(3), ICC-01/05-01/13-1262-Conf, with public annex A, confidential annexes B-E. A public-redacted version was filed on 21 September 2015, ICC-01/05-01/13-1262-Red.

³ Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-13-1170-Conf), ICC-01/05-01/13-1285.

⁴ ICC-01/05-01/13-1285, para. 15.

4. On the same day, the defence team for Mr Babala ('Babala Defence') filed its response to the Rule 68(3) Request ('Babala Response to Rule 68(3) Request')⁵ and its response to the First Rule 68(2) Request ('Babala Response to First Rule 68(2) Request')⁶ submitting that both should be rejected.
5. On the same day, the defence team for Mr Bemba ('Bemba Defence') filed its response to the Rule 68(3) Request, submitting that it does not oppose the admission of the prior recorded testimony of P-272 but that the request with regard to the remaining three witnesses should be dismissed ('Bemba Response').⁷
6. On the same day, the defence team for Mr Kilolo ('Kilolo Defence') filed its response to the Rule 68(3) Request, joining the Bemba Response and adopting 'all the arguments therein except for the one related to the admission of statement of witness P-272'.⁸ It did not make any further submissions.
7. On 15 October 2015, the Prosecution requested to admit P-264's prior recorded testimony pursuant to Rule 68(2)(b) of the Rules ('Second Rule 68(2) Request', together with the First Rule 68(2) Request: 'Rule 68(2) Requests').⁹
8. On 22 October 2015, the Kilolo and Bemba Defence responded to the Second Rule 68(2) Request ('Kilolo and Bemba Response').¹⁰

⁵ Réponse de la Défense de M. Fidèle Babala Wandu à «Prosecution Request for the Admission of Previously Recorded Testimony of P-0020, P-0243, P-0214 et P-0272, pursuant to Rule 68(3) », (ICC-01/05-01/13-1262-Conf), du 17 septembre 2015, ICC-01/05-01/13-1283-Conf.

⁶ Réponse de la défense de M. Fidèle Babala Wandu à la « *Prosecution Request for the Admission of the Previously Recorded Testimony of P-0270, pursuant to rule 68(2)(b)* » (ICC-01/05-01/13-1247-Conf), en vue du respect des articles 24(1) et 51(4) du Statut de Rome, ICC-01/05-01/13-1287-Conf with public annex.

⁷ Defence Response to ICC-01/05-01/13-1262, ICC-01/05-01/13-1294-Conf, with confidential annexes A and B. A first corrigendum was filed on 25 September 2015, ICC-01/05-01/13-1294-Conf-Corr. A second corrigendum was filed on 14 October 2015, ICC-01/05-01/13-1294-Conf-Corr2.

⁸ Joinder to the Bemba Defence Response to 'Prosecution Request for the Admission of Previously Recorded Testimony of P-0020, P-0243, P-0214 and P-0272, pursuant to Rule 68(3)' ICC-01/05-01/13-1262-Conf., ICC-01/05-01/13-1293-Conf.

⁹ Public redacted version of "Prosecution's Motion for the Admission of the Previously Recorded Testimony of P-0264, pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence", 15 October 2015, ICC-01/05-01/13-1378-Conf, ICC-01/05-01/13-1378-Red (with annex, public redacted version notified 16 October 2015). See also CAR-OTP-0085-0512-R02; CAR-OTP-0085-0523-R02; CAR-OTP-0085-0541.

9. On 21 October 2015, P-272 testified before the Chamber.¹¹ On 29 and 30 October 2015, P-20 testified before the Chamber.¹² On 30 October 2015, P-243 testified before the Chamber.¹³ On 3, 4 and 5 November, P-214 testified before the Chamber.¹⁴
10. The Chamber provisionally granted the Rule 68(3) Request for all four concerned witnesses, announcing that it would provide the full reasoning in a written decision in due course.¹⁵

II. Submissions

1. Submissions made in respect of the Rule 68(3) Request

Prosecution

11. The Prosecution wishes to submit: (i) the audio recordings and/or transcripts of P-20's, P-243's and P-272's interviews taken pursuant to Rule 112 of the Rules; (ii) a note in which P-272 corrects typographical errors in the transcript of the interview made during the certification procedure; (iii) P-214's statement taken pursuant to Rule 112 of the Rules and its translation; and (iv)

¹⁰ Joint Defence Response to Prosecution's Request to Admit Statement through Rule 68 (2)(b), ICC-01/05-01/13-1413-Conf. *See also* Clarification to Joint Defence Response to Prosecution's Request to Admit Statement through Rule 68 (2)(b), 22 October 2015, ICC-01/05-01/13-1414-Conf. Responses to the P-264 Request were due on this date, but the Bemba Defence informed the Chamber that the pdf of the Response was only filed at 16:10 due to an error. Email from the Bemba Defence to the Chamber and parties, 22 October 2015 at 16:14; Email from the Chamber to the parties at on 16 October 2015 at 11:37. Pursuant to Regulation 29 of the Regulations of the Court, the Chamber has decided to accept this late submission.

¹¹ Transcript of hearing of 21 October 2015, ICC-01/05-01/13-T-25-Conf-FRA ET.

¹² Transcript of hearing of 29 October 2015, ICC-01/05-01/13-T-31-Conf-FRA ET; and transcript of hearing of 30 October 2015, ICC-01/05-01/13-T-32-Conf-FRA ET.

¹³ Transcript of hearing of 30 October 2015, ICC-01/05-01/13-T-32-Conf-FRA.

¹⁴ Transcript of hearing of 3 November 2015, ICC-01/05-01/13-T-34-Conf-FRA; transcript of hearing of 4 November 2015, ICC-01/05-01/13-T-35-CONF-FRA and hearing of 5 November 2012 ICC-01/05-01/13-T-36-CONF-FRA.

¹⁵ Transcript of hearing of 21 October 2015, ICC-01/05-01/13-T-25-Conf-FRA, p. 5, lines 16-19 ; transcript of hearing of 29 October 2015, ICC-01/05-01/13-T-31-Conf-FRA, p. 17, lines 3-18; and transcript of hearing of 30 October 2015, ICC-01/05-01/13-T-32-Conf-FRA, p. 33, lines 2 to 10 and transcript of hearing of 3 November 2015, ICC-01/05-01/13-T-34-Conf-FRA, p.77, line 18 to p.78, line 21.

the video of P-214's certification of his prior written statements (together 'Rule 68(3) Statements').¹⁶

12. The Prosecution submits that the Rule 68(3) Statements are *prima facie* relevant¹⁷ and probative and reliable.¹⁸ It further argues that admission would avoid unnecessary repetition and reduce the trial's duration. It further submits that the Rule 68(3) Statements are corroborated by other evidence, that a challenge is likely to be limited and that an eventual prejudice would be limited.¹⁹

Defence Submissions

13. The Babala Defence submits that the conditions of Rule 68(3) of the Rules are not fulfilled, arguing that exceptional circumstances are needed to justify admission via Rule 68(3) of the Rules. An assertion that the admission will result in a gain of time is, according to the Babala Defence, not sufficient to justify such admission.²⁰
14. Further, the Babala Defence avers that the four witnesses did not provide their necessary consent for admission into evidence. It argues that the declarations provided by witnesses P-20, P-243 and P-272 in accordance with Rule 68(2)(b)(iii) of the Rules cannot be seen as a consent within the meaning of Rule 68(3) of the Rules.²¹
15. The Bemba Defence submits that the admission of the prior recorded testimony of P-20, P-214 and P-243 would not enhance judicial economy and would be contrary to the rights of the accused, since the content of the Rule

¹⁶ Rule 68(3) Request, ICC-01/05-01/13-1262-Conf, para. 3.

¹⁷ Rule 68(3) Request, ICC-01/05-01/13-1262-Conf, paras 4, 8-16.

¹⁸ Rule 68(3) Request, ICC-01/05-01/13-1262-Conf, paras 4, 17-21.

¹⁹ Rule 68(3) Request, ICC-01/05-01/13-1262-Conf, paras 5, 7, 22-24.

²⁰ Babala Response to Rule 68(3) Request, ICC-01/05-01/13-1283-Conf, paras 6, 8 and 9.

²¹ Babala Response to Rule 68(3) Request, ICC-01/05-01/13-1283-Conf, paras 10-12.

68(3) Statements go to the acts and conduct of the accused²² and problems exist regarding how the statements were produced.²³

16. Both the Bemba and Babala Defence submit that the Rule 68(3) Statements are inadmissible according to Article 69(7) of the Statute due to the conditions under which they were taken.²⁴ With regard to P-20, the circumstances – according to both defence teams – under which the right to be provided with a lawyer was explained to him violate the witness’s rights and render his testimony unreliable²⁵ and antithetical to the proceedings.²⁶ In respect of P-243, both defence teams submit that the circumstances under which the witness was summonsed to the [REDACTED] police station indicate that he was pressured to testify and that his testimony was not voluntary.²⁷ Both defence teams further submit that P-243’s effective right to counsel was denied.²⁸
17. In respect of P-214, the Babala Defence submits that the fact that the prior recorded testimony is merely a summary of the interview and does not permit, in the absence of a transcription, the establishment of the necessary circumstances of the interview. It further argues that the witness was not duly informed of his rights.²⁹ The Bemba Defence submits that P-214’s interview was not conducted in accordance with Rule 112 of the Rules and should therefore be excluded.³⁰

²² Bemba Response, ICC-01/05-01/13-1294-Conf-Corr2, paras 6-10.

²³ Bemba Response, ICC-01/05-01/13-1294-Conf-Corr2, paras 20-27.

²⁴ Babala Response to Rule 68(3) Request, ICC-01/05-01/13-1283-Conf, paras 15-35; Bemba Response, ICC-01/05-021/13-1294-Conf-Corr2, paras 28-37.

²⁵ Babala Response to Rule 68(3) Request, ICC-01/05-01/13-1283-Conf, paras 13, 17-23.

²⁶ Bemba Response, ICC-01/05-01/13-1294-Conf-Corr2, paras 40-54.

²⁷ Babala Response to Rule 68(3) Request, ICC-01/05-01/13-1283-Conf, paras 12-14; Bemba Response, ICC-01/05-01/13-1294-Conf-Corr2, paras 55.

²⁸ Babala Response to Rule 68(3) Request, ICC-01/05-01/13-1283-Conf, para. 35 and Bemba Response, ICC-01/05-01/13-1294-Conf-Corr2, para. 57.

²⁹ Babala Response to Rule 68(3) Request, ICC-01/05-01/13-1283-Conf, paras 28, 32.

³⁰ Bemba Response, ICC-01/05-01/13-1294-Conf-Corr2, paras 60-69.

18. The Bemba Defence further submits that, in the event the Chamber grants admission of the Rule 68(3) Statements, the Prosecution should be restricted from questioning the witnesses on matters that are already addressed in their statements and set out the discrete topics which it intends to address in advance.³¹

2. *Submissions made in respect of the Rule 68(2) Requests*

Prosecution

19. Regarding the First Rule 68(2) Request, the Prosecution wishes to submit: (i) the transcript of P-270's interview from 4 March 2015; and (ii) a note reflecting a clarification P-272 made during the certification procedure (together 'P-270's Statements').³²

20. The Prosecution submits that the P-270's Statements are *prima facie* relevant and sufficiently probative and reliable.³³ It further argues that P-270's evidence does not pertain to the acts and conduct of any of the accused,³⁴ that one of the accused has acknowledged the facts contained in P-270's Statements³⁵ and that admission would cause no prejudice to the accused.³⁶

21. Regarding the Second Rule 68(2) Request, the Prosecution wishes to submit: (i) the transcript of P-264's prior recorded testimony; and (ii) a note reflecting six clarifications made by P-264 during the certification procedure, as contained in annex A of its request ('P-264's Statements', together with 'P-270's Statements': 'Rule 68(2) Statements').³⁷ The Prosecution indicates that P-264's Statements concern P-264 collecting payments from Caroline Bemba (Mr

³¹ Bemba Response, ICC-01/05-01/13-1294-Conf-Corr2, paras 70-76.

³² First Rule 68(2) Request, ICC-01/05-01/13-1247-Conf, para. 2.

³³ First Rule 68(2) Request, ICC-01/05-01/13-1247-Conf, paras 3, 13-17.

³⁴ First Rule 68(2) Request, ICC-01/05-01/13-1247-Conf, para. 13.

³⁵ First Rule 68(2) Request, ICC-01/05-01/13-1247-Conf, para. 16.

³⁶ First Rule 68(2) Request, ICC-01/05-01/13-1247-Conf, para. 20.

³⁷ Second Rule 68(2) Request, ICC-01/05-01/13-1378-Red, para. 2.

Bemba's sister) and handing them over to one of the Main Case defence witnesses at issue in this case.³⁸ The Prosecution submits that P-264's Statements do not pertain to the acts and conduct of the accused, and that other evidence in the case will demonstrate that the payments came at the behest of the accused.³⁹ The Prosecution indicates that P-264 made a declaration to the Registry pursuant to Rule 68(2)(b)(ii) of the Rules,⁴⁰ and indicated 'six minor clarifications' to what P-264 said in the prior recorded testimony.⁴¹

Defence

22. In its Response to the First Rule 68(2) Request, the Babala Defence submits that Rule 68(2)(b) of the Rules is not applicable in the present case, due to the principle of non-retroactivity, incorporating its submission on the subject provided in an earlier motion.⁴²
23. It further submits that the declaration provided by P-270 that the content of his prior recorded testimony are true and correct to the best of his knowledge and belief provided in accordance with Rule 68(2)(b)(ii) of the Rules is not sufficient to accept the prior statement as testimony of P-270.⁴³
24. The Kilolo and Bemba Defence request that the Chamber suspend its determination of the Second Rule 68(2) Request pending disclosure of documentation or information concerning P-264's prior contacts with the

³⁸ Second Rule 68(2) Request, ICC-01/05-01/13-1378-Red, paras 10-11.

³⁹ Second Rule 68(2) Request, ICC-01/05-01/13-1378-Red, para. 11.

⁴⁰ Second Rule 68(2) Request, ICC-01/05-01/13-1378-Red, para. 8. *See also* Annex I to the Registry submission of the declarations made by witness CAR-OTP-P-0264 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 14 October 2015, ICC-01/05-01/13-1371-Conf-AnXI (reclassified as confidential on 23 October 2015).

⁴¹ Annex A to the Second Rule 68(2) Request, ICC-01/05-01/13-1378-Conf-AnxA.

⁴² Babala Response to First Rule 68(2) Request, ICC-01/05-01/13-1287-Conf, paras 16 and 17, incorporating the submissions made in 'Observations de la Défense de M. Fidèle Babala à «Prosecution's Request to Designate a Person Authorised to Witness a Declaration under Rule 68(2)(b)of the Rules of Procedure and Evidence » (ICC-01/05-01/13-1011)', ICC-01/05-01/13-1041, paras 5-19.

⁴³ Babala Response to First Rule 68(2) Request, ICC-01/05-01/13-1287-Conf, paras 18-25.

Prosecution.⁴⁴ Alternatively, the Bemba and Kilolo Defence request that the admission of P-264's Statements be conditioned on: (i) the exclusion of any new information provided by the witness which goes beyond mere corrections or clarifications; and (ii) the witness's agreement to remain available to testify before the Court should the Defence need to elicit further information or clarification from the witness during the course of the proceedings.⁴⁵

III. Analysis

25. The Chamber will first set out the applicable law for Rule 68 of the Rules, addressing questions of general applicability and responding to the objections raised in prior requests by the parties (Section A), before addressing individually the Rule 68(3) Request (Section B) and the Rule 68(2) Requests (Section C).

A. Applicable law for Rule 68 of the Rules

26. The Assembly of States Parties ('ASP') amended Rule 68 on 27 November 2013.⁴⁶ The amended versions of Rules 68(2)(a) and 68(3) correspond to the original wording of the old Rules 68(a) and 68(b), respectively. The new Rules 68(2)(b), 68(2)(c) and 68(2)(d) of the Rules provide the possibility to introduce prior recorded testimony in cases where the witness is not present before the

⁴⁴ Kilolo and Bamba Response, ICC-01/05-01/13-1413-Conf, paras 13-20, 22(i).

⁴⁵ Kilolo and Bemba Response, ICC-01/05-01/13-1413-Conf, para. 22(ii).

⁴⁶ ICC-ASP/12/Res.7. The former Rule 68 of the Rules provided as follows:

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraph 2, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that:

(a) If the witness who gave the previously recorded testimony is not present before the Trial Chamber, both the Prosecutor and the defence had the opportunity to examine the witness during the recording; or

(b) If the witness who gave the previously recorded testimony is present before the Trial Chamber, he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings.

chamber and the parties did not have the opportunity to examine the witness during the recording of the prior recorded testimony.⁴⁷

⁴⁷ Rule 68(2)(b) to (d) of the Rules provide the following:

(b) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused. In such a case:

- (i) In determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, 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, in that other witnesses will give or have given oral testimony of similar facts;
 - relates to background information;
 - is such that the interests of justice are best served by its introduction; and
 - has sufficient indicia of reliability.

- (ii) Prior recorded testimony falling under sub-rule (b) may only be introduced if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief. Accompanying declarations may not contain any new information and must be made reasonably close in time to when the prior recorded testimony is being submitted.

- (iii) Accompanying declarations must be witnessed by a person authorised to witness such a declaration by the relevant Chamber or in accordance with the law and procedure of a State. The person witnessing the declaration must verify in writing the date and place of the declaration, and that the person making the declaration:

- is the person identified in the prior recorded testimony;
- assures that he or she is making the declaration voluntarily and without undue influence;
- states that the contents of the prior recorded testimony are, to the best of that person's knowledge and belief, true and correct; and
- was informed that if the contents of the prior recorded testimony are not true then he or she may be subject to proceedings for having given false testimony.

(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.

1. *Notion of prior recorded testimony*

27. As noted above, some of the defence teams have raised in their responses to the several requests made by the Prosecution for admission of documentary evidence, issues concerning the applicability of Rule 68 of the Rules.⁴⁸
28. The Chamber will therefore first interpret Rule 68 and the notion of ‘prior recorded testimony’.
29. Other chambers of this Court have repeatedly interpreted the notion of ‘prior recorded testimony’ of the old Rule 68 to include audio- or video-taped testimony, transcripts of a testimony of a witness and written statements taken under Rules 111 and 112 of the Rules.⁴⁹
30. Trial Chamber V(A), when assessing if this interpretation is also applicable to the new version of Rule 68, stated that:

-
- (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.

⁴⁸ See, Response to “Prosecution’s Third Request for the Admission of Evidence from the Bar Table”, 14 September 2015, ICC-01/05-01/13-1243-Conf, paras 14-21; Narcisse Arido’s Response to the Prosecution’s Second Bar Table Motion (ICC-01/05-01/13-1113-Conf), 31 August 2015, ICC-01/05-01/13-1197-Conf, para. 9-11, a public redacted version was filed on 1 September 2015, ICC-01/05-01/13-1197-Red; Narcisse Arido’s Response to the Prosecution’s Third Bar Table Motion (ICC-01/05-01/13-1170-Conf), 14 September 2015, ICC-01/05-01/13-1241-Conf, a public redacted version was notified on 9 October 2015, ICC-01/05-01/13-1241-Red; Kilolo Defence Response to “Prosecution’s Third Request for the Admission of Evidence from the Bar Table”, 14 September 2015, ICC-01/05-01/13-1246-Conf, para. 6(ii).

⁴⁹ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses, 15 January 2009, ICC-01/04-01/06-1603; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Corrigendum to the Decision on the Prosecution Motion for admission of prior recorded testimony of Witness P-02 and accompanying video excerpts, 27 August 2010, ICC-01/04-01/07-2289-Corr-Red; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Prosecutor's request to allow the introduction into evidence of the prior recorded testimony of P-166 and P-219, 3 September 2010, ICC-01/04-01/07-2362; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, dated 15 December 2011, 9 February 2012, ICC-01/05-01/08-2012-Red, paras 134-136. See also Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386, (OA 5 & OA 6), paras 79-81.

[...] the fact that neither the WGLL [Working Group on Lessons Learnt] nor the ASP made any effort to qualify 'prior recorded testimony' when amending Rule 68 demonstrates an intention, or at least an openness, for the amended Rule 68 to continue to apply to recorded statements under Rules 111 and 112. Defining 'prior recorded testimony' in this way is also consistent with the language and purpose of the amended Rule 68.⁵⁰

31. The Chamber agrees with this finding and sees no compelling reason to deviate from this prior jurisprudence. The Chamber finds further support in maintaining a broad interpretation of 'prior recorded testimony' in the drafting history of the amended Rule 68 which indicates that the amendment was borne out of a need to give the chambers of the Court 'more discretion to introduce transcripts or previously recorded reliable testimony in certain circumstances, in order to expedite proceedings'.⁵¹
32. However, this does not mean that any information provided by a person can be considered to be prior recorded testimony. As clarified by Trial Chamber II, when discussing the question of whether a statement can be considered prior recorded testimony, the person must understand, when providing his or her statement, 'that he or she is providing information which may be relied upon in the context of legal proceedings'.⁵² Not every conversation a person has or every communication provided by the person qualifies as 'testimony' – it is rather only those where persons are questioned in their capacity as witnesses in the context of or in anticipation of legal proceedings. The Chamber also agrees with Trial Chamber II that it is not necessary for the person to know against whom an investigation is initiated or

⁵⁰ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution Request for Admission of Prior Recorded Testimony; 19 August 2015, ICC-01/09-01/11-1938-Corr-Red2, para. 32.

⁵¹ Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, ICC-ASP/12/37/Add.1, para.11.

⁵² Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motion's, ICC-01/04-01/07-2635, para. 49.

the precise contours and the alleged crimes for which the investigations are conducted.⁵³

33. Considering the above, the Chamber finds that, while statements taken pursuant to Rule 111 or 112 of the Rules can be considered testimonial in nature, the contents of the intercepted telephone calls at issue cannot be considered as testimony within the meaning of Rule 68 of the Rules. These calls are not the result of questioning persons in their capacity as witnesses, nor are they made in the context of legal proceedings. Further, the persons speaking are not necessarily aware that the information they provide might be used in future criminal proceedings. The same holds true for the other intercepted or seized communications at issue, such as text messages or emails. In all these cases there are no signs that the implicated persons knew that they were questioned as witnesses and that their information might be used in criminal proceedings. Accordingly, the Chamber finds that Rule 68 is generally not applicable for any intercepted or seized material which comprises communication between two or more persons.
34. Further, the Chamber considers that Rule 68 of the Rules is only applicable in cases where the tendering party wishes to adduce the prior recorded testimony for the truth of its contents. The determining factor is the intention of the tendering party. If a party wishes to introduce the testimony only with the aim of proving that the witness stated something – irrespective of if it is true or not⁵⁴ - or in order to prove inconsistencies in the witness's statements,⁵⁵

⁵³ Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motion's, ICC-01/04-01/07-2635, para. 49.

⁵⁴ See Decision on Prosecution Motion for Clarification of Rule 68(3) Direction in Conduct of Proceedings Decision, 15 September 2015, ICC-01/05-01/13-1249 and Decision on Prosecution Request for Judicial Notice, 9 November 2015, ICC-0/05-01/13-1473.

⁵⁵ See Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Corrigendum to Redacted Decision on the defence request for the admission of 422 documents, 8 March 2011, ICC-01/04-01/06-2595-Red-Corr, para. 50. See also ICTR, Appeals Chamber, *Aloys Simba v. The Prosecutor*, Judgement, 27 November 2007, ICTR-01-

it is not necessary to introduce the statements pursuant to Rule 68 of the Rules.

2. *General objections against the application of Rule 68(2)*

35. Some of the reasoning in these paragraphs is by a majority of the Chamber. Judge Pangalangan will append a separate opinion in due course.
36. In respect of the application of Rule 68(2) of the Rules *ratione temporis*, the Babala Defence submits in essence that Articles 24(2) and 51(4) of the Statute prohibit any application to the present case, since the Rule was amended on 27 November 2013,⁵⁶ after the commencement of the proceedings against the five accused.
37. Article 24(2) of Statute provides that in the event of change of law the law more favourable to the person being prosecuted shall apply. Article 51(4) of the Statute states that the amendments to the Rules ‘shall not be applied retroactively to the detriment of the person who is being [...] prosecuted’.
38. The Chamber is of the view that the new Rule 68(2) of the Rules is not, on its face, a less favourable law for the accused. Rule 68(2) provides for all parties, the Prosecution and the Defence, possibilities to introduce prior recorded testimony before a Trial Chamber.⁵⁷ It is therefore neutral with respect to its content and its applicability. Accordingly, it must also be seen as neutral in its general character. Any other assumption would entail a fragmented case-by-case assessment of the law in question in order to determine its applicability according to Article 24(2) of the Statute, with the new Rule 68(2) applying in

76-A, para. 20 (with reference to ICTY Rule 92 *bis*, which is the ICTY’s analogue to Rule 68(2)(b) of the Rules).

⁵⁶ See paragraph 26 above and footnote 46.

⁵⁷ See further, Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1938-Corr-Red2, para. 22, stating that the principle of non-retroactivity contained in Article 24(2) is not applicable to Rule 68 of the Rules and that this provision is ‘more applicable’ to substantive laws than procedural ones.

cases the defence wants to invoke it and being barred from usage if the Prosecution wants to rely on it. This would lead to a uncertainty on the applicable law which is contrary to aim of the principle of non-retroactivity. Accordingly, the Chamber finds that Article 24(2) of the Statute does not prevent the introduction of prior recorded testimony in this case.

39. For the same reasons that finds that Rule 68 is not applied 'to the detriment of the persons being investigated or prosecuted' in the sense of Article 51(4) of the Statute. As previously stated by Trial Chamber V(A), the Chamber 'considers that the amended Rule 68 should be read on its face alone. The Chamber looks at the application of the amended rule in the abstract, and not at any concrete application of it'⁵⁸ and finds it to be neutral in its application. The Chamber emphasises that removing a case-by-case analysis from the Article 51(4) assessment does not mean that the Chamber foregoes such an analysis. The Chamber will assess any detriment to the accused in any concrete application of the amended Rule 68 when deciding whether to allow for the formal submission of materials under this provision.⁵⁹
40. Further, the Chamber also agrees with Trial Chamber V(A) that the use of a procedural provision can only be considered as retroactive in its application when it concerns issues which have been previously been ruled upon by the Chamber.⁶⁰ 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

⁵⁸ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1938-Corr-Red2, para. 24.

⁵⁹ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1938-Corr-Red2, para. 27.

⁶⁰ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-1938-Corr-Red2, para. 23.

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) of the Rules is not applied in a retroactive manner in this instance.

41. Accordingly, the Chamber finds that Rule 68(2) of the Rules is applicable in the present case.

3. *Objections raised by the defence teams in responses to prior requests*

42. The Chamber makes reference to paragraph 3 above and will now address the concrete issues raised by the defence teams of Mr Mangenda, Mr Arido and Mr Kilolo ('Mangenda Defence', 'Arido Defence', respectively, together with the Kilolo, Babala and Bemba Defence: the 'Defence') with regard to certain documents the Prosecution intended to submit as documentary evidence.

43. All three defence teams argue that statements made by the accused and conversations between the accused fall under Rule 68 and should therefore only be admitted if its conditions are fulfilled.⁶¹ The Chamber notes that it ruled in a previous decision that statements given by an accused do not fall under Rule 68 of the Rules.⁶² Accordingly, it rejects this argument.

44. The Mangenda and Arido Defence argue that annexes of reports submitted by the independent counsel ('Independent Counsel') should be admitted pursuant to Rule 68 of the Rules, since they contain specific and precise factual assertions and are therefore testimonial in nature.⁶³ The Chamber recalls that the role of the Independent Counsel is to analyse material and

⁶¹ ICC-01/05-01/13-1243-Conf, paras 19-21; ICC-01/05-01/13-1197-Red, paras 8-11, ICC-01/05-01/13-1246-Conf, para. 6(ii).

⁶² Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, ICC-01/05-01/13-1432, para. 22.

⁶³ ICC-01/05-01/13-1243-Conf, para. 19; ICC-01/05-01/13-1241-Red, paras 8-13 and 20-24. The Chamber notes that the Arido Defence raises the same arguments again in Narcisse Arido's Response to the Prosecution's Fourth Bar Table Motion (ICC-01/05-01/13-1310-Conf), 20 October 2015, ICC-01/05-01/13-1403-Conf, para.24. Accordingly, the Chamber's findings apply equally to these arguments.

identify information relevant for the Article 70 investigations while assuring that the potentially privileged character of the material is respected. Thus, the Chamber considers the reports of the Independent Counsel to be largely analytical in nature. In the event that the reports contain factual allegations, these are either drawn from the material underlying the reports of the Independent Counsel or have been provided to the Independent Counsel and are not his own (e.g. the attribution of telephone numbers to certain individuals). As a result, these portions of the reports cannot be considered testimonial within the meaning of Rules 68 of the Rules.

45. The Chamber agrees that the column 'Remarques' contained in one of the reports⁶⁴ contains factual allegations made by the Independent Counsel. However, the Chamber does not consider that this renders the overall character of the document 'testimonial'. This information is provided in order to justify why the material selected by the Independent Counsel is relevant to the case and non-privileged in nature⁶⁵ and therefore does not constitute the main purpose of the report (which is the transmission of intercepted communication). Further, the Chamber recalls its findings in paragraph 32 above, and notes that the Independent Counsel was not questioned in the capacity as a witness. Accordingly, the Chamber rejects the arguments made with regard to these documents in respect of objections related to Rule 68 of the Rules.

⁶⁴ See, CAR-OTP-0074-0897.

⁶⁵ Premier rapport du Conseil indépendant (période du 15 au 30 août 2013), 25. October 2013, ICC-01/05-64-Conf-Exp, re-classified as 'confidential' on 15 May 2015, ICC-01/05-64-Conf, para. 18. See also Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 15 May 2015, ICC-01/05-01/13-947, para. 16.

46. The Arido Defence further submits that intercepted communication is testimonial in nature.⁶⁶ The Chamber makes references to its findings above (paragraph 33) and rejects the argument.
47. Finally, the Arido Defence argues that a report given by one of the defence witnesses in the case of the *Prosecutor v Jean-Pierre Bemba Gombo* ('Main Case') falls under Rule 68 of the Rules.⁶⁷ The statement is a report presented by witness D-53 in the Main Case which was intended as an 'expert report'. The Chamber recalls its findings made in paragraph 33 above. The report was not produced as a result of a witness being questioned in his capacity as a witness. Accordingly the Chamber finds that it is not testimonial in the sense of Rule 68 of the Rules.⁶⁸

B. Rule 68(3) Request

48. The Chamber notes the Babala Defence's general objection against the admission of the Rule 68(3) Statements, arguing that exceptional circumstances are necessary which go beyond a mere invocation of expeditiousness. The Chamber notes that Rule 68(3) of the Rules, through the wording of 'may allow the introduction', provides it with a discretionary power to admit prior recorded testimony or not. Being cognisant of the principle of orality enshrined in Article 69(2) of the Statute, the Chamber is of the view that the fact that in-court-testimony of a witness can be considerably shortened through the admission of prior recorded testimony can be, in itself, a sufficient reason for granting a Rule 68(3) request as long as the witness does not object to the submission of the prior recorded testimony and the

⁶⁶ ICC-01/05-01/13-1241-Red, paras 12-13, incorporating by reference ICC-01/05-01/13-1197-Red, paras 8-13.

⁶⁷ ICC-01/05-01/13-1241-Red, para. 19, making reference to CAR-D04-0003-0342.

⁶⁸ The Chamber notes that the Bemba Defence raises similar objections to documents CAR-OTP-0072-0234 and CAR-OTP-0072-0329 in its Defence Response to Prosecution's Fourth Request for the Admission of Evidence from the Bar Table (ICC-01/05-01/31-1310-Conf), 20 October 2015, ICC-01/05-01/13-1402-Conf, para. 37. Accordingly, the Chamber rejects these arguments on the same reasoning.

additional requirements of Rule 68(3) are met and bearing in mind the additional factors provided by the Appeals Chamber in its application.⁶⁹

49. The Chamber notes the further submission by the Babala Defence made generally against an admission into evidence pursuant to Rule 68(3) of the Rules, because of the lack of consent of P-20, P-214, P-243 and P-272. However, during their in-court testimony all witnesses concerned did not object to the introduction via Rule 68(3).⁷⁰ Accordingly, the Chamber finds the objections of the Babala Defence in this regard to be moot.

50. The Chamber recalls that allowing the introduction of previously recorded testimonies lies within the discretionary powers of the Chamber. Mindful of the prior jurisprudence of this Court, the Chamber notes to the following factors it may take, among others, into consideration when deciding on requests made pursuant to Rule 68(3): (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether the evidence is central to the allegations or the case; and (iii) whether the evidence is corroborative.⁷¹

51. The Chamber will assess if the central motivation for admittance via Rule 68(3) of the Rules – the saving of time and the expeditious conduct of the proceedings – is served while fully respecting the rights of the defence to a fair trial. For this purpose, it will conduct a case-by-case assessment for each of the statements provided by the four witnesses, taking into consideration all

⁶⁹ Appeals Chamber, *The Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", ICC-01/05-01/08-1386 (OA 5 & OA6), para. 78 with further jurisprudence cited therein.

⁷⁰ Transcript of hearing of 21 October 2015, ICC-01/05-01/13-T-25-Conf-FRA, p. 22, line 14 to p.23, line 14 ; transcript of hearing of 29 October 2015, ICC-01/05-01/13-T-31-Conf-FRA, p. 4, line 17 to p. 5, line 6; and transcript of hearing of 30 October 2015, ICC-01/05-01/13-T-32-Conf-FRA, p. 42, line 10 to p.43, line 13 and transcript of hearing of 3 November 2015, ICC-01/05-01/13-T-34-CONF-FRA, p.93, line 22 to p. 94, line 19.

⁷¹ Appeals Chamber, *The Prosecutor v Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", ICC-01/05-01/08-1386 (OA 5 & OA6), para. 78 with further jurisprudence cited therein.

the relevant circumstances of the taking of the statements and the content of the testimony and being mindful of the jurisprudence of the Appeals Chamber as laid out in the previous paragraph.

1. *The prior recorded testimony of P-20*

52. The Bemba and Babala Defence submit, in essence, that the prior recorded testimony of P-20 is inadmissible pursuant to Article 69(7) of the Statute since the witness's right to legal assistance was violated.
53. In general terms, both defence teams submit that an admission of the prior recorded testimony would not enhance judicial economy due to the content of the statements.

a) *Inadmissibility according to Article 69(7)*

54. The Chamber recalls its prior jurisprudence in regard of Article 69(7)⁷² of the Statute.⁷³ Accordingly, it will first determine if a violation of the Statute or internationally recognised human rights has occurred. And, only if so, in a second step it will assess if this violation 'casts substantial doubt on the reliability of the evidence' or whether the admission of the evidence 'would be antithetical to and would seriously damage the integrity of the proceedings'.
55. The right to legal assistance of a person that is subject of an investigation is a statutory right, under Article 55(2)(c) of the Statute as well as an

⁷² The provision of Article 69(7) of the Statute provides the following:
Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
(b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

⁷³ Decision on Kilolo Defence Motion for Inadmissibility of Material, 16 September 2015, ICC-01/05-01/13-1257, paras 7-9; Decision on Request to declare telephone intercepts inadmissible, 24 September 2015, ICC-01/05-01/13-1284, para. 17 and Decision on Bemba and Arido Defence Requests to Declare Certain Materials Inadmissible, 30 October 2015, ICC-01/05-01/13-1432, para. 8.

internationally recognised human right.⁷⁴ It is widely recognised as one of the fundamental features of a fair trial and must be not be merely theoretical but practical and effective.⁷⁵ Any waiver of this right must be voluntary and unequivocal.⁷⁶

56. During his interview with the investigators of the Prosecution and the [REDACTED] authorities, which was taken pursuant to Article 55(2) of the Statute and Rule 112 of the Rules, P-20 is first apprised of his right to be assisted by legal counsel and then informed that he will not have to pay for the counsel by himself. He stated his wish to be provided with the assistance of counsel.⁷⁷ In response to this, one of the [REDACTED] investigators present asked P-20 if he wanted have counsel present immediately, stating that this would prolong the interview as they would have to wait for the counsel to come. P-20 reiterated his wish to be provided with counsel.⁷⁸ The same [REDACTED] investigator asked again if P-20 is not willing to listen to the questions from the ICC investigators first or if wanted a lawyer immediately. P-20 then stated that he can respond to the questions he wishes to respond to and otherwise he will ask for legal assistance.⁷⁹ The [REDACTED] investigator repeated that P-20 has the right to counsel, also for the day in question if he wished, but proposed that P-20 listens to the questions of the Court's investigators. P-20 agreed with this procedure.⁸⁰ Thereafter, the [REDACTED] investigator explained that P-20 has still the right to a lawyer later on should

⁷⁴ Article 14(3)(d) of the International Covenant on Civil and Political Rights; article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 8(2)(d) of the American Convention on Human Rights.

⁷⁵ See, European Court of Human Rights (Grand Chamber), *Salduz v. Turkey*, 27 November 2008, 36391/02, paras 51 and 55.

⁷⁶ See, European Court of Human Rights, *Kwiatkowska v. Italy*, 30 November 2000, 52868/99, on the possibility to waive the rights contained in Article 6(3)(c) in general, available only in French, Section 'En Droit', para.1; European Court of Human Rights, *Pishchalnikov v. Russia*, 24 September 2009, 7025/05, para. 77.

⁷⁷ ICC-01/05-01/13-1262-Conf-AnxB, p. 25, lines 567 to 595.

⁷⁸ ICC-01/05-01/13-1262-Conf-AnxB, p. 26, lines 597 to 619.

⁷⁹ ICC-01/05-01/13-1262-Conf-AnxB, pp. 26-27, lines 622 to 644.

⁸⁰ ICC-01/05-01/13-1262-Conf-AnxB, p. 27, lines 645-662.

he be called to testify again.⁸¹ One of the Court's investigators conducting the interview asked the witness twice if he wishes to continue without a lawyer, which P-20 affirms twice.⁸²

57. The Chamber has not only read the transcript of the statement provided by P-20 but also listened to the corresponding audio recordings in order to ascertain if P-20 was renouncing his right for legal assistance voluntarily and unequivocally. It is true that P-20 initially asked to be provided with legal assistance, and that the comment made by the [REDACTED] investigator about the time it would take to provide a lawyer could be perceived as an exercise of pressure to renounce this right. However, P-20 explained that he wished to be provided with a counsel because he did not know the content of the questions, and then agreed that he first listen to the questions and then decide if he wanted assistance from a counsel. The [REDACTED] investigator immediately replied that 'the most important thing is' that P-20 has the right to a counsel and is not obliged to answer the questions, which the witness confirms. Subsequently, the ICC investigator asked P-20 twice if he is willing to continue without counsel, which he again confirms.
58. Having examined the audio recordings of this part of the statement, the Chamber is of the view that neither the [REDACTED] investigators nor the investigators of the Court conducted themselves in a manner which created pressure for P-20 to renounce his right to legal assistance or intimidated him in order to compel the witness to continue the interview without a lawyer. After agreeing to continue without a lawyer the witness was asked in a calm manner several times if he is certain that he wished to continue, stressing that it is his own decision. During his in-court testimony, the P-20 confirmed that he wished that the questions were first put to him in order to allow him to

⁸¹ ICC-01/05-01/13-1262-Conf-AnxB, p. 27, lines 663-667.

⁸² ICC-01/05-01/13-1262-Conf-AnxB, pp. 27-28, lines 669-688.

decide if he wanted to answer them or wanted to request the advice of counsel.⁸³

59. Moreover, during his testimony, P-20 repeated on several occasions that he was fully aware that a lawyer would be provided to him, that he would not have to pay for legal services and that he did not feel put under pressure by the police or the Prosecutor's investigators.⁸⁴
60. Accordingly, the Chamber finds that P-20 waived his right voluntarily and unequivocally and, consequently, that his right to legal assistance was not violated. The Chamber therefore does not find any violation which justifies any further assessment under Article 69(7)(a)-(b) of the Statute.

b) Considerations regarding a formal submission via Rule 68

61. The Chamber notes that P-20 did not object to the introduction of his previously recorded testimony.⁸⁵
62. The Chamber further notes that P-20 is one of the 14 defence witnesses of the Main Case who were allegedly interfered with and who provides testimony in respect of his alleged interference. His prior recorded testimony includes, among others, information regarding contacts with Mr Kilolo and money transfers by several of the accused to P-20 and his wife.
63. With regard to the alleged telephone contacts between P-20 and Mr Kilolo, the Prosecution relies also on allegedly corroborating evidence in the call data records. Equally, purportedly corroborating evidence is relied upon for the alleged money transfers. In one instance, the money transfer seems not to be

⁸³ Transcript of hearing of 29 October 2015, ICC-01/05-01/13-T-31-FRA ET, p. 41, lines 7-10.

⁸⁴ Transcript of hearing of 29 October 2015, ICC-01/05-01/13-T-31-FRA ET, p. 41, lines 2-6, p. 42, lines 8-12, p.43, lines 6-10 and p. 85, lines 6-27.

⁸⁵ Transcript of hearing of 29 October 2015, ICC-01/05-01/13-T-31-Conf-FRA, p. 17, lines 11-17 and p.18, lines 8-11.

denied by the accused who allegedly sent money to P-20 on behalf of another accused.⁸⁶ In respect to the allegation that the witness did not tell the truth during his testimony in the Main Case, the Prosecution relies also on official records of this testimony.

64. Considering the above, the Chamber finds that the introduction via Rule 68(3) of the Rules of the prior recorded testimony of P-20 serves the expeditiousness of the proceedings. Such introduction will also not improperly limit the principle of orality prescribed in Article 69(2) of the Statute or unduly prejudice the defence, considering that P-20 testified before this Chamber and the Defence had the opportunity to fully examine P-20 on all relevant issues.⁸⁷ Accordingly, the Chamber grants the Rule 68(3) Request with regard to P-20.

2. The prior recorded testimony of P-243

65. The Babala and Bemba Defence submit both that P-243's prior recorded testimony is inadmissible pursuant to Article 69(7) of the Statute.
66. Regarding the general criteria of Rule 68 of the Rules both defence teams submit that the admission of the prior recorded testimony would not enhance judicial economy.

a) Inadmissibility according to Article 69(7)

67. The Babala and Bemba Defence both submit that undue pressure was exercised on P-243 due to the conditions in which the interview was conducted by the Court's investigators and the [REDACTED] police

⁸⁶ Deuxième CORRIGENDUM de la Réponse de la Défense de Monsieur Fidèle Babala Wandu au Document de Notification des Charges (ICC-01/05-01/13-526-AnxB2-Red), 9 January 2015, ICC-01/05-01/13-596-Conf-Corr2, paras 20, 43, 82 and 213.

⁸⁷ See in the same regard, Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-2289-Corr-Red, para. 14.

rendering the testimony involuntary and ultimately vitiating P-243's waiver of the right to remain silent.

68. P-243 was, in accordance with [REDACTED] laws, summonsed to a police station for the purposes of an Article 55(2) interview.⁸⁸ He was immediately provided with a lawyer.⁸⁹ P-243 was informed that he was suspected of having committed an offence under Article 70(1)(a) of the Statute.⁹⁰ The Court's investigators also informed P-243 that he was not the target of the ongoing investigations but that the investigators wanted information for investigations against the five accused.⁹¹ He was then explained his right to remain silent and asked if he wishes to waive this right; P-243's counsel advised him to 'answer the questions we can answer' and P-243 agreed.⁹² It was then noted that counsel had already been appointed to P-243 and he was asked if he wished to continue the interview with this counsel, to which P-243 agreed.⁹³ He was further informed that he is free to ask questions at any time, to take breaks if he wished to do so or consult his counsel at any moment in private.⁹⁴ P-243's counsel asked him if he wished to talk to him in private before commencing the substantive part of the interview and P-243 agreed and consulted his lawyer.⁹⁵ After the break counsel confirmed that P-243 was ready to answer the questions of the investigators.⁹⁶

69. The Chamber will first determine if the right not to be deprived of one's liberty was violated before assessing and, in a second step, if the right to legal assistance was violated.

⁸⁸ ICC-01/05-01/13-1262-Conf-AnxC, p. 7, line 145 to p. 8, line 178.

⁸⁹ ICC-01/05-01/13-1262-Conf-AnxC, p. 3, line 27 to 29.

⁹⁰ ICC-01/05-01/13-1262-Conf-AnxC, p. 12, line 312 to p. 13, line 351.

⁹¹ ICC-01/05-01/13-1262-Conf-AnxC, p. 16, lines 458 to 474.

⁹² ICC-01/05-01/13-1262-Conf-AnxC, p. 17, lines 486 to 510.

⁹³ ICC-01/05-01/13-1262-Conf-AnxC, p. 18, lines 517-532.

⁹⁴ ICC-01/05-01/13-1262-Conf-AnxC, p. 21, lines 634 to 643.

⁹⁵ ICC-01/05-01/13-1262-Conf-AnxC, p. 21, line 650 to p. 22, line 669.

⁹⁶ ICC-01/05-01/13-1262-Conf-AnxC, p. 24, lines 12 to 17.

70. The right to not be deprived of one's liberty is recognised in the Statute under Article 55(1)(d), and enshrined in internationally recognised human rights instruments.⁹⁷ However, this right is not without limitations, as foreseen both in Article 55(1)(d) of the Statute as well as Article 5(1) of the European Convention of Human Rights. While Article 55(1)(d) of the Statute provides that the reason for the restriction of the liberty must be on grounds of and in accordance with procedures as established by the Statute, Article 5(1) of the European Convention of Human Rights provides an exhaustive⁹⁸ list of reasons for exceptions to this right.
71. While the act of obliging P-243 to attend the interview at the police station may be seen to raise issues of deprivation of liberty,⁹⁹ the Chamber notes that P-243 was interviewed under Article 55(2) of the Statute, pursuant to a request made under Part 9 of the Statute. Accordingly, the Chamber finds that P-243's deprivation of liberty was executed in accordance with procedures established in this Statute.
72. Further, [REDACTED] provides the possibility to put a person in custody person for questioning. [REDACTED].¹⁰⁰ The aforementioned provisions constitute a valid limitation to the right not to be detained according to Article 5(1)(b) of the European Convention of Human Rights.
73. Accordingly, the Chamber finds that the summoning of P-243 in itself was not a violation of the Statute or internationally recognised human rights.
74. With regard to the right for legal assistance, the Chamber notes that P-243 immediately received assistance from counsel. He was reminded, in

⁹⁷ Article 5(1) of the European Convention of Protection of Human Rights and Fundamental Freedoms ('European Convention of Human Rights').

⁹⁸ See, European Court of Human Rights, *Shimovolos v. Russia*, 21 June 2011, 30194/09, para. 51.

⁹⁹ See, European Court of Human Rights, *Shimovolos v. Russia*, 21 June 2011, 30194/09, paras 48-50, finding that a person being held at a police station for 45 minutes can constitute a deprivation of liberty.

¹⁰⁰ [REDACTED].

presence of his counsel, that he has the right to remain silence. After being informed that he was suspected of having committed offences under the Statute but was not the target of the current investigation, and having consulted privately with the lawyer, P-243 decided to answer the questions of the Court's investigators.¹⁰¹

75. It is true that, at one point in the interview, the witness requests in French that his lawyer explains a question to him. This request is not translated. However, the confusion seems to stem from an imprecise translation of the investigator's question and, the interviewer himself clarifies the matter and the witness willingly continues the conversation.¹⁰² Taking into consideration particularly that the omission to translate the request seems to have been inadvertent and that the witness's question was answered by one of the interviewers himself, this does not constitute a violation of the right to have effective access to counsel. Further, the Chamber is not of the view, as suggested by the Bemba Defence, that the advice of P-243's legal counsel to cooperate with the investigators instead of remaining silent is indicative that the witness's right to legal assistance might have been ineffective.
76. Additionally, P-243's testified before the Chamber that he was not asked any questions before the arrival of his lawyer¹⁰³ and that he stated that the manner in which the on-going investigation of the Prosecution was explained to him did not pressure him to renounce his right to silence.¹⁰⁴
77. Accordingly, the Chamber also finds that P-243's right to legal assistance was not violated.

¹⁰¹ ICC-01/05-01/13-Conf-AnxC, p. 12 (CAR-OTP-0074-1101), lines 312-324, p. 16 (CAR-OTP-0074-1105), line 458 to p. 18 (CAR-OTP-0074-1107), line 532; p. 21 (CAR-OTP-0074-111), line 650 to p. 24 (CAR-OTP-0074-1113), line 20.

¹⁰² ICC-01/05-01/13-Conf-AnxC, page 49 (CAR-OTP-0074-1138), line 492 to p. 50 .

¹⁰³ Transcript of hearing of 30 October 2015, ICC-01/05-01/13-T-32-CONF-FRA, p. 76, lines 16 to 28; p. 83, line 26 to p. 84, line 8. P.83, line 17 to p.84, line 4.

¹⁰⁴ Transcript of hearing of 30 October 2015, ICC-01/05-01/13-T-32-CONF-FRA, p. 80, line 24 to p. 82, line 5 .

b) Considerations regarding a formal submission via Rule 68

78. The Chamber notes that P-243 provided his consent to the introduction of his previously recorded testimony.¹⁰⁵
79. The Chamber further notes that P-243 is one of the 14 defence witnesses of the Main Case who were allegedly interfered with, and provides testimony in respect of his alleged interference. His prior recorded testimony includes, among others, information regarding contacts with Mr Kilolo and money transfers by one of the accused and persons associated to one of the accused with P-243's daughter.
80. With regard to the alleged telephone contacts between P-243 and Mr Kilolo, the Prosecution relies additionally on allegedly corroborating evidence, presenting call data records and audio recordings. Equally, allegedly corroborating evidence is presented for the alleged money transfers. In respect to the allegation that the witness did not tell the truth during his testimony in the Main Case, the Prosecution relies additionally on official records of this testimony.
81. Considering the above, the Chamber finds that the introduction via Rule 68(3) of the Rules of the prior recorded testimony of P-243 serves the expeditiousness of the proceedings. Such introduction will also not unduly prejudice the Defence considering that P-243 testified before this Chamber, which allowed the Chamber to get an immediate impression of the witness and that the Defence had the opportunity to fully cross-examine P-243 on all relevant issues of his testimony. Accordingly, the Chamber grants the Rule 68(3) Request with regard to P-243.

¹⁰⁵ Transcript of hearing of 30 October 2015, ICC-01/05-01/13-T-32-Conf-FRA, p.42, line 10 to p.43, line 13.

3. *The prior recorded testimony of P-272*

82. P-272 provided his consent to the introduction of his previously recorded testimony during his in-court testimony.¹⁰⁶
83. The Chamber notes that the Bemba Defence did not object to the introduction of the prior recorded testimony of P-272 pursuant to Rule 68(3) of the Rules. The Babala Defence, besides general objections against an introduction pursuant to Rule 68(3), did not provide any specific reasons why the Rule 68(3) Request in respect of P-272 should be rejected.
84. P-272's prior recorded testimony concerns transfers of money he allegedly undertook on behalf of one of the accused. Some of these payments were destined for defence witnesses in the Main Case or their family members; others were destined to other accused.
85. In respect of these allegations, the Prosecution relies on additional evidence and such as Western Union documentation. In one instance, the money transfer seems not to be denied by the accused on whose behalf P-272 allegedly sent money.¹⁰⁷
86. Considering the above, the Chamber finds that the introduction via Rule 68(3) of the Rules of the prior recorded testimony of P-272 serves the expeditiousness of the proceedings. Such introduction will also not unduly prejudice the defence considering that P-272 testified before this Chamber, which allowed the Chamber to get an immediate impression of the witness and that the defence had the opportunity to fully cross-examine P-272 on all relevant issues of his testimony (and, in fact, asked this witness

¹⁰⁶ Transcript of hearing of 21 October 2015, ICC-01/05-01/13-T-25-Conf-FRA, p. 22, line 22 to p. 23, line 14.

¹⁰⁷ ICC-01/05-01/13-596-Conf-Corr2, paras 20, 43, 82 and 213.

no questions). Accordingly, the Chamber grants the Rule 68(3) Request with regard to P-272.

4. *The prior recorded testimony of P-214*

87. During his in-court testimony, P-214 stated that he did not object to the introduction of his prior recorded testimony.¹⁰⁸
88. The Chamber notes that both the Babala and the Bemba Defence object to the introduction of the prior recorded testimony due to the form of the testimony. Further, the Bemba Defence avers that the prior recorded testimony was not taken according to the requirements of Rule 112 of the Rules.
89. Usually, interviews conducted according to Rule 112 of the Rules shall be audio- or video-recorded. However, if the witness objects to the recording a written statement the procedure in Rule 111 of the Rules shall be followed, pursuant to Rule 112(1)(a) of the Rules. The Prosecution submits that P-214 refused the recording of his interview,¹⁰⁹ however the written record states that he 'renounced' his rights ('renoncer' in the French translation of the interview, [REDACTED]¹¹⁰). The Chamber is of the view that this leaves a certain degree of ambiguity as to whether the witness just 'dispensed' with the recording requirement of the Rules or whether he 'refused' be recorded as described in Rule 112 of the Rules. However, P-214 stated during his in-court testimony that the interview was not recorded because he objected to it.¹¹¹
90. As to the argument that it is impossible for the Defence to ascertain if the witness's waiver of the right to legal assistance was informed and unequivocal, the Chamber notes that the record of the interview reflects that

¹⁰⁸ Transcript of hearing of 3 November 2015, ICC-01/05-01/13-T-34-Conf-FRA, p. 93, line 20 to p. 94, line 15.

¹⁰⁹ Prosecution Rule 68(3) Request, ICC-01/05-01/13-1262-Conf, para. 3, footnote 5.

¹¹⁰ ICC-01/05-01/13-1262-Conf-AnxD, p. 4 (CAR-OTP-0074-0862) at lines 8 and 9 and p. 16 (CAR-OTP-0074-0877).

¹¹¹ Hearing of 5 November 2012 ICC-01/05-01/13-T-36-CONF-FRA, p. 45, line 1 to 4.

P-214 was informed of his right to a counsel and that he did not invoke that right.¹¹² Further, the witness stated during his in-court-testimony that he did not ask for legal assistance.¹¹³ Accordingly, the Chamber does not find any indications that P-214's right to legal assistance was infringed.

91. The Chamber notes that P-214 is one of the 14 defence witnesses in the Main Case, who were allegedly interfered with, and who provides testimony in respect of his alleged interference. His prior recorded testimony includes, among others, evidence of P-214 being asked to lie about his motivation to sign a letter that was sent in relationship to facts concerning the Main Case, telephone contacts with two of the accused, the fact that he received money from one of the accused for traveling purposes, P-214 lying during his testimony in the Main Case about having received any money and about prior contacts with the Bemba Defence upon the instruction of one of the accused.
92. The Chamber notes that the Prosecution relies on purportedly corroborating evidence with regard to the alleged facts regarding the letter signed by P-214 and the money transfer, which is additionally admitted by one of the accused.¹¹⁴ In respect of the prior contacts with two of the accused, the Prosecution additionally relies on call data records and, with regard to the issue of P-214 not telling the truth during his testimony in the Main Case, on his testimony in the Main Case and additional documentary evidence.
93. Considering the above, the Chamber finds that the introduction via Rule 68(3) of the Rules of the prior recorded testimony of P-214 would serve the expeditiousness of the proceedings. The Chamber is conscious that the prior recorded testimony consists of a summary of P-214's interview and not a

¹¹² ICC-01/05-01/13-1262-Conf-AnxD, pp. 12, 13 and 15 (CAR-OTP-0074-0873, -0874 and -0876)

¹¹³ Hearing of 5 November 2012 ICC-01/05-01/13-T-36-CONF-FRA, p. 44, line 12-24.

¹¹⁴ Conclusions en réponse au « Document Containing the Charges » (ICC-01/05-01/13-526-Conf-AnxB1), 12 August 2014, ICC-01/05-01/13-600-Conf-Corr2, para. 340.

verbatim transcription. However, it recalls that statements taken in accordance with Rule 111 of the Rules fall also under the application of Rule 68, as stated in paragraph 33 above. Further, this does not, in the view of the Chamber, diminish the potential expediting effect of formally submitting this statement according to Rule 68(3) of the Rules. Furthermore, P-214 confirmed several times during his in-court testimony that the contents of this testimony was truthful.¹¹⁵

94. Such introduction will also not unduly prejudice the Defence, considering that P-214 testified before this Chamber and the defence to fully examined P-214 on all relevant issues in his testimony. Accordingly, the Chamber grants the Rule 68(3) Request.

C. Rule 68(2) Requests

95. Rule 68(2)(b) of the Rules allows for the formal submission of prior recorded testimony when it goes to proof of a matter other than the acts and conduct of the accused. This decision is discretionary, and the Chamber has a non-exhaustive list of factors it must consider when assessing a Rule 68(2)(b) issue.¹¹⁶
96. The Chamber recalls its findings with regard to the applicability of Rule 68(2) of the Rules in paragraphs 35 to 40. It will now analyse the request for each witness individually.

1. *Prior recorded testimony of P-270*

97. The only objection made by the Babala Defence specifically in respect of the introduction of the prior recorded testimony of P-270 is that the declaration

¹¹⁵ Transcript of hearing of 3 November 2015, ICC-01/05-01/13-T-34-Conf-FRA, page 91, line 5 to 9 and p.95, line 6 to 11.

¹¹⁶ Rule 68(2)(b)(i) of the Rules.

provided by the witness does not correspond with the requirements of Rule 68(2)(b)(ii) and (iii) of the Rules.

98. According to these provisions, the declaration must: (i) contain a statement by the witness that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief; (ii) may not contain new information; (iii) must be made reasonably close in time to the request for submission; and (iv) be witnessed by a person authorised to witness such declaration with a number of requirements specified in Rule 68(2)(b)(iii) of the Rules.
99. The Chamber notes that P-270 made his declaration on 3 September 2015 in the presence of a person authorised by the Chamber to witness the declaration. P-270 identified himself as the person having made the prior recorded testimony, stated that the contents of his prior recorded testimony are true and correct to the best of his knowledge and belief, was informed of the consequences of providing false testimony and provided clarifications to his statement.¹¹⁷ These clarifications do not contain new information but are merely provided to rectify inadvertencies and explanations with regard to non-substantive matters.¹¹⁸
100. The Chamber is of this view that in the present circumstances this sort of information is not to be considered 'new information' within the meaning of Rule 68(2)(b)(ii), but rather constitutes part of the prior recorded testimony itself. To conclude otherwise reduces the reliability of Rule 68(2)(b) prior recorded testimony for no good reason, precluding witnesses from correcting

¹¹⁷ Registry submission of the declarations made by witnesses CAR-OTP-P-0270 and CAR-OTP-P-0272 pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 8 September 2015, ICC-01/05-01/13-1224-Conf with two confidential annexes. Annex I contains the declaration of P-270 and the person authorised by the Court to witness the declaration, ICC-01/05-01/13-1224-Conf-AnxI.

¹¹⁸ P-270 specified that he was represented by two counsel and indicated which counsel spoke at specific instances in the interview; he corrected the date of year he provided; and made one other comment of a clarifying nature; ICC-01/05-01/13-1224-Conf-AnxI, p. 3.

or clarifying details which – if not corrected or clarified - might be erroneously relied upon. Accordingly, the Chamber finds that the requirements of Rule 68(2)(b)(ii) and (iii) of the Rules are fulfilled.

101. With regard to the content of the prior recorded testimony the Chamber notes that it does not go to the acts and conduct of one of the accused, relates to a very limited incident and is supported by other material. Additionally, none of the Defence has provided objections as to why the content of P-270's Statements should not be introduced via Rule 68(2). Having thus considered the criteria of Rule 68(2)(b)(i) of the Rules, the Chamber grants the First Rule 68(2) Request.

2. Prior recorded testimony of P-264

102. The Chamber considers that the formal pre-requisites of P-264's prior recorded testimony under Rule 68(2)(b) of the Rules are met. Unlike situations where the accused are allegedly giving payments to witnesses directly,¹¹⁹ P-264's statements only concern the acts and conduct of persons other than the accused. P-264 has also provided a declaration which meets the requirements set out in Rule 68(2)(b)(ii) of the Rules, and this declaration has been provided to the defence teams since the Response was filed.¹²⁰

103. The Chamber also considers that the factors set out in Rule 68(2)(b)(i) of the Rules militate in favour of formally submitting P-264's statements in lieu of any *viva voce* testimony. In particular, P-264's statements do not go to any matters which are materially in dispute and the interests of justice are best served by formally submitting this kind of basic payments information in a manner which does not absorb valuable court time. No argument is raised

¹¹⁹ See Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior Recorded Testimony of P-242 Pursuant to Rule 68(2)(b) of the Rules, 29 October 2015, ICC-01/05-01/13-1430.

¹²⁰ See Kilolo and Bemba Response, ICC-01/05-01/13-1413-Conf, paras 4 and 24.

contesting that the Rule 68(2)(b)(i) factors militate against formally submitting P-264's statement.

104. The matter the Kilolo and Bemba Defence instead contest is primarily whether the Prosecution has provided adequate information on its contacts with P-264. The Kilolo and Bemba Defence argue that information on how cooperative P-264 has been with the Prosecution is necessary for them to be able to assess whether P-264 might be available to be examined by the Defence at a later stage during the proceedings.¹²¹
105. The Chamber does not consider these to be valid considerations in the present context. The Chamber has repeatedly held that Prosecution contacts with its witnesses are not *per se* disclosable,¹²² and the Chamber fails to see what relevance any Prosecution efforts to assuage P-264's concerns over testifying would have on whether P-264's prior statements could be considered under Rule 68(2)(b).
106. The entire purpose of Rule 68(2)(b) of the Rules is to identify certain situations where it is not necessary to examine witnesses while preserving the fair and expeditious conduct of the proceedings. The Kilolo and Bemba Defence do not argue that it must be able to examine P-264 – only that they require further information as to whether they could seek to do so at a later point in time. Such arguments are effectively concessions that examining P-264 does not appear to be strictly necessary and that P-264's Statement can be validly considered under Rule 68(2)(b) of the Rules. The Bemba and Kilolo Defence may indeed seek to call P-264 in their presentation of evidence, but the Chamber considers that P-264's prior recorded testimony is such that it may

¹²¹ Response, ICC-01/05-01/13-1413-Conf, paras 9-14.

¹²² Transcript of hearing of 12 October 2015, ICC-01/05-01/13-T-18-CONF-ENG ET, p. 50 lines 7-10; Decision on Arido Defence Requests for Disclosure and to Delay the Testimony of Witnesses P-245 and P-260, 28 September 2015, ICC-01/05-01/13-1309, para. 12.

be formally submitted without need to confirm whether or not P-264 is willing and available to testify for the defence.

107. As a further matter, the Kilolo and Bemba Defence contest the extent to which the Chamber may rely upon new facts not contained in P-264's original statement. Specifically, when signing the Rule 68(2)(b) declaration, P-264 added 'the new information that D-6 had been in contact with [P-264] before [P-264's] first meeting with the Prosecution and that he had advised [P-264] not to meet with the Prosecution, and that [P-264] had heard the Defence witnesses often discussing Me. Kilolo'.¹²³
108. The Chamber agrees with the Bemba and Kilolo Defence that this fact provided by P-264 goes beyond corrections or clarifications. It constitutes 'new information' which goes against the purpose of Rule 68(2)(b)(ii) of the Rules. Accordingly, the Chamber will not consider this fact in its judgment. The Chamber grants the Second Rule 68(2) Request, except for the additional information as identified in the previous paragraph above.

¹²³ Kilolo and Bemba Response, ICC-01/05-01/13-1413-Conf, para. 16.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Rule 68(3) Request, recognising the Rule 68(3) Statements as specified in ICC-01/05-01/13-1262-AnxA, as formally submitted to the Chamber; and

GRANTS the First Rule 68(2) Request and the Second Rule 68(2) Request, subject to paragraphs 106 and 107 above, recognising the Rule 68(2) Statements, as contained in ICC-01/05-01/13-1247-Conf-AnxA and CAR-OTP-0085-0512-R02; CAR-OTP-0085-0523-R02; CAR-OTP-0085-0541 and ICC-01/05-01/13-1378-Conf-AnxA, as formally submitted to the Chamber.

Judge Pangalangan's separate opinion will be appended in due course.

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



Judge Bertram Schmitt, Presiding Judge



Judge Marc Perrin de Brichambaut



Judge Raul C. Pangalangan

Dated 12 November 2015

At The Hague, The Netherlands

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.