XXXVII POLISH YEARBOOK OF INTERNATIONAL LAW
2017
DOI 10.7420/pyil2017d
PL ISSN 0554-498X

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CHANGING EVIDENTIARY RULES TO THE DETRIMENT OF THE ACCUSED? THE RUTO AND SANG DECISION OF THE ICC APPEALS CHAMBER

Abstract:
The main topic of this article is retroactive application of procedural criminal law. In this text the question will be posed – and answered – whether the application of a new procedural provision that entered into force in the course of an ongoing proceeding should in that proceeding be considered as retroactive and in what scope or/and under what conditions can such retroactivity be allowed for. As will be shown the solutions in national jurisdictions differ according to the common law – continental law states divide. This problem will be discussed in the light of a decision in the ICC Ruto and Sang case. In this case the ICC Appeals Chamber had to answer several questions pertaining to the temporal application of new procedural provisions. Firstly, the Chamber had to decide whether a general ban on the retroactive application of substantive law should also apply to procedural criminal law. Secondly, the ICC Appeals Chamber had to analyze the criteria according to which it would evaluate whether the change of rules of criminal procedure in the course of an ongoing trial was to be considered as having a retroactive effect, and whether the change in the rules of admission of evidence could be considered detrimental to the accused. Thirdly, it will be shown that the ICC Appeals Chamber has chosen the common law concept of "due process rights" rather than the idea of "intertemporal rules" known from the continental doctrine, and why it chose to do so.

Keywords: ICC, ICC Rules of Procedure and Evidence, International Criminal Court, intertemporal rules, *lex retro non agit*, retroactive application of criminal law, retroactive application of procedural criminal law, Rome Statute, Ruto and Sang case

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INTRODUCTION

This article discusses the retroactive application of procedural criminal law. Usually, in substantive criminal law the rule is that a criminal act should be punished on the basis of the law in force at the time the act was committed (*lex retro non agit*) – unless the new law is more favourable to the accused.[1] Substantive criminal law thus operates to the favour of the accused. But there is no similar general rule in procedural criminal law. Rules concerning the temporal application of substantive and procedural criminal law are usually set out separately.

In the first part of this article general problems of the retroactive application of procedural criminal law are presented, and in this context, it is important to define intertemporal rules. There is neither an official definition of intertemporal rules nor is there an obligation to denote the rules as such. Whether a rule may be affiliated with the scope of intertemporal rules depends rather on how and in which field it is applied. The easiest way to understand this concept is to describe "intertemporal rules" as a group of directives that rule conflicts of law in time. The retroactivity analysis is seen as a choice between an old and a new legal rule.[2] According to a more complicated, but also more accurate, definition intertemporal rules are directives established by the legislator in the course of lawmaking and applied with the aim of solving intertemporal problems.[3] Whether a certain rule of criminal procedure can be included into the group of "intertemporal rules" depends on its content – whether it expresses a rule that commands the application of a specific procedure only to legal situations arising or ongoing after the rule's entry into force.[4]

This article further discusses how new rules of criminal procedure are to be applied to ongoing trials. The crucial test – in the light of the above-mentioned definition of intertemporal rules – is whether the application of a new procedural provision that entered into force in the course of an ongoing proceeding should be considered to be retroactive in that proceeding. As will be shown, the solutions adopted in national jurisdictions differ according to the common law/continental law divide. These different

[1] *E.g.* Article 4 of the Polish Criminal Code, Section 2(3) of the German Criminal Code, U.S. Constitution, Article I § 9 cl. 1. The first state that introduced the constitutional prohibition on the retroactive use of criminal law was Maryland in 1776. *See* W. Wróbel, *Zmiana normatywna i zasady intertemporalne w prawie karnym* [Normative change and intertemporal principles in criminal law], Zakamycze, Kraków: 2003, p. 361.

[2] P. Czarnecki, A. Matukin, *Intertemporalne aspekty obowiązywania ustawy karnej procesowej – zarys problematyki* [Intertemporal aspects of operation of criminal procedural law – an outline of the problematique], 1 Czasopismo Prawa Karnego i Nauk Penalnych 183 (2010), p. 188.

[3] H. Paluszkiewicz, *Kilka uwag o gwarancyjnym charakterze przepisów przejściowych w ustawie z dnia 27 września 2013 r. o zmianie ustawy - kodeks postępowania karnego i niektórych innych ustaw* [A few comments on the transitional nature of the transitional provisions in the Act of 27 September 2013 amending the Act - the Code of Criminal Procedure and some other acts], in: B. Bieńkowska, H. Gajewska-Kraczkowska, M. Rogacka-Rzewnicka (eds.), *Wokół gwarancji współczesnego procesu karnego. Księga jubileuszowa profesora Piotra Kruszyńskiego*, Warszawa: 2015, p. 342; H. Paluszkiewicz, *Studia z zakresu problematyki intertemporalnej w prawie karnym procesowym* [Studies in the field of intertemporal issues in criminal procedural law], CH Beck, Warszawa: 2016, pp. 88-90.

[4] *See* Paluszkiewicz (*Kilka uwag*), *supra* note 3, p. 342.

methods of solving the problem will be presented before the background to the general dilemma of whether the application of a new procedural provision that entered into force in the course of an ongoing proceeding should be considered retroactive in that proceeding. The article will give some basic information on the above-mentioned legal orders, with Germany and Poland will be chosen as examples of the continental tradition and the United States of America as an example of the common law approach.

This article will also analyse the approach of the ICC to this problem in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (the "Ruto and Sang case").[5] In this case the ICC Appeals Chamber had to decide whether the general ban on retroactive application of substantive law should apply also to procedural criminal law. Secondly, the ICC Appeals Chamber had to define the criteria according to which it would analyze whether a change in the rules of criminal procedure during the course of an ongoing trial were to be considered retroactive, and whether a change in the rules of admission of evidence could be considered detrimental to the accused. The Chamber decided that the basis for assessing whether the application of a rule concerning the introduction of evidence at trial was "retroactive" was the procedural regime in force at the start of the trial.

Finally, in the last part of the article the dogmatic, political and practical consequences of this approach are discussed – as well as the actual consequences of the ICC Appeals Chamber's decision on the outcome of the specific case.

1. GENERAL RULES OF TEMPORAL APPLICATION OF PROCEDURAL CRIMINAL LAW

The fundamental rule of substantive criminal law is that the retroactive application of law is forbidden – a criminal act should be punished on the basis of the law in force at the time the act was committed. Most jurisdictions also recognise an exception to this general rule when the new law is more favourable (lenient) to the accused. On the other hand, where the rules on the application of procedural rules are in question, these rules usually differ in the practice of continental states and that of the common law states.[6]

1.1. The common law concept of "vested rights" (due process theory)

In common law states the term "retroactive" describes an effect which occurs when a new law is imposed.[7] The U.S. Supreme Court defined what it considered to be *ex*

[5] Judgment on the appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", ICC-01/09-01/11 OA 10, decision of 12 February 2016.

[6] S. Waltoś, P. Hofmański, *Proces karny. Zarys systemu* [Criminal process. An outline of the system], Wolters Kluwer, Warszawa: 2013, p. 144; W. Daszkiewicz, *Proces karny. Część ogólna* [Criminal procedure. General part], Uniwersytet Mikołaja Kopernika, Toruń: 1972, p. 25; J. T. Woodhouse, *The Principle of Retroactivity in International Law*, 41 Problems of Public and Private International Law 69 (1955), p. 70, who even names those states that place this ban in their constitutions.

[7] W.D. Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 California Law Review 216 (1960), p. 217.

post facto laws, prohibited by the US Constitutional prohibition, as follows: "[e]very law that makes an action done before the passing of the law and which was innocent when done, criminal and punishes such action" and also "[e]very law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender."[8] The evaluation of whether the retroactive application of procedural law is forbidden is based on an assessment of the position of the accused and on whether the change affects his/her "vested rights."[9] A law is retroactive if it changes the legal consequences of past events, i.e. when it provides that something which was not the law at the date anterior to its passage shall be treated as having been the law on that date.[10] This doctrine is based on the assumption that the judicial evaluation of a situation should be based on the law that was in force when an individual made a choice to act. If the new law is applied retroactively, it may not only affect previously established rights or legal relationships or alter pre-existing legal arrangements; it can also change the future consequences of a choice taken by an individual before the law's entry into force.[11]

The arguments for such a rule have been set out in the jurisprudence of the U.S. Supreme Court.[12] In *Teague v. Lane*[13] the Court stated that a new rule related to a change in criminal procedure should not be given retroactive effect, unless it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." In short, procedural statutes may be applied retroactively as long as there is no injustice done.[14] As the accused made his or her choice(s) as to the most desirable line of defence at the beginning of a trial, it is this point in time that should determine whether the change was detrimental to the accused and has thus a prohibited retroactive effect. In consequence, the notion of "vested rights" is central to the definition of the ideas of fairness, justice, the public good and moral rights and tailors them to a given case.[15]

1.2. Procedural intertemporal rules as rules of conflict of laws in continental systems

Whereas the common law doctrine and jurisprudence are based on the concept of vested rights and on a general assessment of the notion of due process rights, continental

[8] *Calder v. Bull*, 3 U.S. 3 Dall. 386 386 (1798).

[9] *E.g.* Slawson, *supra* note 7, p. 217; Woodhouse, *supra* note 6, p. 77-79 who compares retroactive application of law with a game of chess where the rules change during the game; had the change been made before the commencement of the game the players would have made different moves.

[10] Woodhouse, *supra* note 6, p. 78.

[11] J.G. Laitos, *Legislative Retroactivity*, 52 Washington University Journal of Urban and Contemporary Law 81 (1997), p. 81.

[12] *Linkletter v. Walker*, 381 U.S. 618 (1965), judgment of 7 June 1965, para. 629.

[13] *Teague v. Lane*, 489 U.S. 288 (1989), judgment of 22 February 1989.

[14] M.R. Doherty, *The Reluctance Towards Retroactivity: The Retroactive Application of Laws in Death Penalty Collateral Review Cases*, 39 Valparaiso University Law Review 445 (2004), p. 465; J. Popple, *The Right to Protection from Retroactive Criminal Law*, 13(4) Criminal Law Journal 251 (1989), p. 253.

[15] Woodhouse, *supra* note 6 at 80.

states have clear and structured procedural intertemporal rules. There, intertemporal rules are regulated in statutes. If the law changes in the course of a trial, the statute offers provisions on how to apply the new law in the course of an ongoing case. Usually three different possibilities can be adopted:

1) conducting the trial to the end according to the old law (the old law rule);
2) repeating the trial from the beginning according to the new provisions (the new law rule);
3) the conducted procedural activities remain valid, whereas the new activities in the trial are conducted according to the new provisions (the mixed rule).[16]

Continental statutes (in Poland and Germany) usually operate according to the mixed rule – the conducted activities remain valid, whereas the new activities in the trial are conducted according to the new provisions. In most cases, however, the intertemporal statutes offer no provisions with regard to intertemporal rules, thus the new procedural rules apply as soon as the new rule enters into force and also can be applied retroactively. Therefore, there is no general prohibition of applying evidentiary laws retroactively: if taking evidence that was formerly illegal becomes legal under a new rule, the courts are prone to also use evidence taken before the rule change.

The three options may be chosen in accordance with practical demands. The two first solutions can also be adopted depending on the stage of the trial. In some cases, the new law applies from the start of a certain stage of the proceedings, e.g. from the beginning of the appellate proceedings or when charges are brought.[17] In Poland this rule is also known as the rule of "catching up in the course of a trial" (*chwytania w locie*), which means applying the new provisions to an ongoing case.[18] This approach generally allows procedural law to be applied retroactively. This rule however, has exceptions. In certain situations, where it is practicable a legislator may decide to apply the old law – which in Polish procedure is called "petrification" or "stability of the competence" of a certain court or a court of certain instance to adjudicate an ongoing case (*perpetuatio fori*),[19] if it would be unreasonable to change the forum in the course of a trial and start the trial anew. In this situation however, one of the most important exceptions is also that the validity of procedural activities already concluded is determined according to the old governing regulations.[20]

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[16] *See* M. Cieślak, *Polska procedura karna* [Polish criminal procedure], PWN, Warszawa: 1984, p. 182; Waltoś & Hofmański, *supra* note 6, p. 145. In German doctrine these issues were discussed by G. Dannecker, *Das intertemporale Strafrecht*, Mohr Siebeck, Tübingen: 1993, p. 317.

[17] Act of 27 September 2013 about amending the act - Code of Criminal Procedure and some others acts (Dz. U. 2013, item 1247), Article 36; Act of 11 March 2016 about amending the act – Code of Criminal Procedure and some other acts Dz. U. 2016, item 437), Article 26.

[18] Act of 27 September 2013, Article 27: "[t]he provisions of the acts mentioned in art. 1-26 of this Act, in the wording of this Act, applies to cases initiated before its entry into force, unless the provisions below provide otherwise." In German law the same solution applies, *see* Dannecker, *supra* note 16, p. 317.

[19] Act of 27 September 2013, Article 30.

[20] *Ibidem*, Article 28: "[p]rocedural actions made before the date of entry into force of this Act shall be effective if they have been made in compliance with the provisions in force so far" (Act of 11 March 2016, Article 20).

This general rule and the exceptions to it are accompanied by an additional rule, according to which the new law applies if there are any doubts as to which law reigns (*in dubio lex nova*).[21]

The purpose of introducing a new law – as it is explained by a legislator – is usually to eliminate an inaccurate or ineffective legal solution and to introduce a new law better adapted to practice as construed by a rational legislator.[22] Therefore, as the legislator maintains, the new law should usually be applied straightaway. But if the new rule is more detrimental to the accused, this model – as applied in Poland – has some serious disadvantages. The most serious disadvantage is the fact that neither the legislator nor the court will take the factor of detriment of the accused into consideration, nor the fact that the accused may have certain "vested rights." Most continental legal orders only allow for exceptions to this rule where formalities are concerned. There are no exceptions based on certain vested rights of the accused or the fairness of the proceedings. The legislator's point of interest usually focuses on the protection of judicial efficiency and structure, not on the protection of individual rights.

2. PROCEDURAL INTERTEMPORAL RULES IN THE ROME STATUTE

2.1. The facts of the "Prior Recorded Testimony Decision" in the ICC's Ruto and Sang case

In *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, a case tried as part of the situation in the Republic of Kenya, the International Criminal Court had to interpret the possibility of retroactive application of a procedural law which had changed during the course of the proceedings.

On 12 of February 2016, the Appeals Chamber of the ICC issued a judgment on the appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony."[23] In that judgment the Appeals Chamber discussed the timeframe for the application of the recently amended Rules of Procedure and Evidence (RPE[24]), as these amendments came into effect in the course

[21] Act of 27 September 2013, Article 29; Act of 11 March 2016, Article 21. *See also* Paluszkiewicz (*Kilka uwag*), *supra* note 3, pp. 341-342.

[22] In German doctrine this opinion has been widely presented: *See*, *inter alia*, C. Roxin, *Strafrecht. Allgemeiner Teil*, Band I: *Grundlagen. Der Aufbau der Verbrechenslehre*, C.H. Beck, München 2006, p. 166; E. Dreher, H. Tröndle, *Strafgesetzbuch und Nebengesetze*, C.H. Beck, München: 1982, p. 20. For Polish doctrine, *see* Czarnecki & Matukin, *supra* note 2, pp. 190-191.

[23] Judgment on the appeals of Mr. William Samoei Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", ICC-01/09-01/11 OA 10, decision of 12 February 2016 (the Appeals Chamber decision).

[24] Rules of Procedure and Evidence, published by the International Criminal Court, ISBN No. 92-9227-278-0 ICC-PIDS-LT-02-002/13_Eng, 2013, as amended by the Assembly of States Parties to the

of the trial proceeding in the Ruto and Sang case. Two aspects are key in this judgment: Firstly, there is the question of whether the application of a new procedural provision that entered into force in the course of an ongoing proceedings to that proceedings is retroactive; and secondly whether the new rule that allowed for the admission into evidence of a wider scope of prior recorded statements changed the accuseds' situation to their detriment. Finally, there is the question whether the general ban on retroactive application of substantive law should apply at all – and if so what should be the scope of its application – to procedural criminal law.

The questions of how to apply intertemporal rules of procedural law correctly to the circumstances of a concrete case came up when the ICC Prosecutor requested the Trial Chamber to admit prior recorded testimony of certain "Concerned Witnesses" (names redacted) for the truth of their content. The Prosecution wanted to rely thereon in order to establish the guilt of the accused. According to the Prosecution Rule 68, as amended, should be considered to be applicable. The "prior recorded testimony" that Rule 68 addresses should encompass the prior written statements of witnesses made in anticipation of their testimony at trial. The Prosecutor argued that the admission of such evidence should be possible either under Rule 68 RPE, or alternatively under Article 69(2) and (4) of the Statute.[25] The Prosecution contended that even if Rule 68 as amended was to be considered retroactive in application, it would not apply to the detriment of the accused because the amended procedure for the admission of prior recorded testimony would be equally available to both the Prosecution and the Defence.[26]

Both of the accused opposed this motion. On 12 June 2015, Mr. William Samoei Ruto and Mr. Joshua Arap Sang filed their responses to the Prosecutor's Request to Admit Prior Recorded Testimony into Evidence.[27]

On 19 August 2015, the Trial Chamber rendered its "Decision on Prosecution Request for Admission of Prior Recorded Testimony."[28] In this decision it granted (in part) the Prosecutor's Request to Admit Prior Recorded Testimony into Evidence, by admitting into evidence prior recorded testimony under Rule 68(2)(c) and (d) of the amended Rules. According to the Trial Chamber applying Rule 68 as amended to the present case did not have retroactive effect, neither was it detrimental to the accused.

Rome Statute of the International Criminal Court, Twelfth Session, The Hague, 20-28 November 2013, Resolution ICC-ASP/12/Res.7.

[25] Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses, registered on 21 May 2015, ICC-01/09-01/11-1866-Red, paras. 1, 239.

[26] Prosecution's request, paras. 15 and 24-31.

[27] For Mr. Ruto: Public redacted version of Corrigendum of Ruto Defence response to the "Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses", ICC-01/09-01/11-1908-Corr-Red, registered 23 June 2015. For Mr. Sang: Public Redacted Version of Corrigendum to Sang Defence Response to "Prosecution's Request for the Admission of Prior Recorded Testimony of [Redacted] Witnesses", ICC-01/09- 01/11-1911-Corr-Red, registered 2 July 2015.

[28] Decision on Prosecution Request for Admission of Prior Recorded Testimony, ICC-01/09-01/11-1938-Corr-Red2 (Trial Chamber decision), TC, 19 August 2015, paras. 54-55.

It therefore did not fall within the scope of Article 51(4) of the Rome Statute (the Statute), which stipulates that "Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted." The Chamber agreed with the arguments presented by the Prosecutor that admitting prior recorded testimony that was not admissible earlier is not retroactive as it "is not seeking to alter anything which the Defence has previously been granted or been entitled to as a matter of right." According to the Chamber, "The Prosecution is seeking to apply the provision prospectively to introduce items into evidence."[29] The Chamber thus presented its definition of the notion of "retroactivity": a case of retroactive application of a procedural norm exists if, for example, the Prosecution attempted to apply an amended admissibility provision to exclude evidence previously admitted into the record. In consequence, every new procedural provision is applied "prospectively" if its application concerns decisions taken after its entry into force. The Trial Chamber thus found in *Ruto and Sang* that the new procedural rules usually apply in an ongoing trial.

The Chamber also expressed the view that the principle of non-retroactivity, as set out in Article 24(2) of the Statute, pertains only to substantive law, such as the crimes set out in Articles 5 to 8bis of the Statute. It does not apply to procedural law. Article 24(2) and Article 51(4) of the Statute should thus be interpreted and applied differently. Article 24(2) appears in the part of the Statute that governs "General Principles of Criminal Law." The norm forms part of the provisions that together set out the principle of legality before the Court. In the view of the Trial Chamber, if Article 24(2) of the Statute governed all amendments to the Rules, "Article 51(4) would be rendered almost entirely redundant." The Chamber was however careful not to say that this principle "does not generally apply to the Rules." It simply restricted the scope of the norm and stated that it "does not consider that the amended Rule 68 falls under Article 24(2) of the Statute." Therefore, the Chamber considered that the amended Rule 68 can only be considered subject to Article 51(4) of the Statute. And since Article 51(4) only bars the application of the amended Rule 68 if it applies "retroactively to the detriment of the person who is being (…) prosecuted", it raises no obstacles to the application of the new evidentiary rules in this case.

Neither did the Trial Chamber agree with the accused that the application of the new Rule 68 RPE is applied "to the detriment of the person who is being (...) prosecuted" within the meaning of Article 51(4) of the Statute. The determination of whether the application of Rule 68 can be considered detrimental to the accused could not be simply based on the fact that the new rule allows the Prosecution to request the admission of incriminatory evidence against the accused. The amended Rule 68 is a rule of neutral application – it is an admissibility rule that can be invoked equally by all parties to the proceedings before the Court. The accused can also make use of the new rule to defend him/herself to the "detriment" of the Prosecution:

[29] Trial Chamber decision, para. 23.

> The Chamber looks at the application of the amended rule in the abstract, and not at any concrete application of it. To do otherwise would create uncertainty and double standards across procedural amendments, potentially requiring oscillation between amended and unamended rules each time an application was filed.[30]

Both Mr. Ruto and Mr. Sang requested leave to appeal this decision, which was granted. They indicated that in one of the previous judgments, in another case, the Trial Chamber had already held that the retroactive application of amended Rule 68 of the Rules should not occur in pending cases.[31] They therefore wanted the Appeals Chamber to rule that a modification in the law that occurs "during the course of pending proceedings will only apply to those proceedings provided it does not offend the presumption against the retroactive application of legislation."

2.2. The decision of the Appeals Chamber

The Appeals Chamber thus had to decide whether the present case falls within the scope of Article 24(2) or of Article 51(4) of the Statue, and if Article 51(4) applies, whether the application of Rule 68 was both "retroactive" and "detrimental to the accused." To do so, the Appeals Chamber did not have to explain the scope of the new Rule 68 allowing for the admission of prior recorded statements, nor to decide – as the Trial Chamber had done – whether the evidence that the Prosecutor sought to introduce fell within the scope of Rule 68 at all. Nor did it have to decide what the standard of proof was for evaluating the conditions of Rule 68 on admissibility. It only had to decide whether a procedural norm introduced during the course of a trial could be applied in these proceedings from its date of entry into force, and, if so, whether there were any conditions for its application.

The Appeals Chamber found that admitting prior recorded statements of a witness into evidence that had not been admissible before an amendment of rules during the course of the proceedings was both retroactive and detrimental to the accused. Therefore, it fell within the scope of Article 51(4) of the Statute that expressly forbids such retrospective application of the Rules of Procedure and Evidence. The Appeals Chamber thus held that the Trial Chamber had applied the amended Rule 68 of the Rules retroactively to the detriment of the accused and reversed the "Decision on Prosecution Request for Admission of Prior Recorded Testimony" to the extent that the prior recorded testimony had been admitted under amended Rule 68 of the Rules to establish the truth of its contents. According to the Appeals Chamber, any application of the RPE was retroactive if this effected changes in the procedural regime which had been in place at the start of the trial. It held that when deviating from the principle of orality, a Chamber must ensure that doing so is not prejudicial to or inconsistent with

[30] *Ibidem*, para. 24.

[31] Referring to *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the admission into evidence of items deferred in the Chamber's previous decisions, items related to the testimony of Witness CHM-01 and written statements of witnesses who provided testimony before the Chamber of 17 March 2014, ICC-01/05-01/08-3019-Red, 26 August 2014, ft 88 and 111.

the rights of the accused or the fairness of the trial. In the view of the Appeals Chamber, this requires a cautious assessment. The Trial Chamber may, for example, take into account a number of factors, including the following: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether the evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.

Three issues were deemed crucial within this decision. The first was to clarify whether and how the *lex retro non agit* rule established in substantive criminal law applies to changes in procedural criminal law. The second issue was to determine whether the elements of Article 51(4) were satisfied, in particular whether the application of the new Rule 68(2)(d) RPE was to the detriment of the accused. The third question concerned the application of a new Rule of Procedure and Evidence in an ongoing trial. The Appeals Chamber decided that the application of the new procedural rules fell within the scope of Article 51(4) of the Statute and within the scope of the notion of "retroactive" operation of the law.

2.3. Intertemporal procedural rules v. intertemporal substantive rules

The interesting part of the Ruto and Sang decision is the distinction drawn between Article 51(4) and Article 24 of the Rome Statute. The latter provides that no person shall be held criminally responsible under the Statute for conduct which took place prior to the entry into force of the Statute. It also stipulates that if the substantive law applicable to a given case changes prior to a final judgment, the law which is more favourable to the person being investigated, prosecuted, or convicted shall apply.

On the other hand, Article 51(4) of the Statute regulates the circumstances under which amendments to the Rules of Procedure and Evidence shall not be applied to an ongoing case: "[a]mendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted."

Since both intertemporal rules are incorporated into one body of law (the Rome Statute), one may ask whether Article 24(2) includes a general norm and whether Article 51(4) of the Rome Statute is a *lex specialis* to the general rule. Another difference, as compared to national legal systems, is that the intertemporal rules for procedural law were adopted in the Rome Statute and are also applicable to the Rules of Procedure and Evidence.[32] With regards to procedural intertemporal rules the question should be asked whether the prohibition of retroactive application should be understood in the same way and banned to the same extent as in the case of substantive law.

What then, in effect, are the intertemporal rules for the law of the International Criminal Court? In the Rome Statute there is no direct reference to "procedural inter-

[32] There is, however, no provision related to intertemporal rules in the case of a change in the Statute. As the Statute is an international convention there was an assumption that any procedural changes were to be introduced by the Assembly of the State Parties in the Rules of Procedure and Evidence, and not by the laborious procedure of ratification of an amendment of the Statute by all the State Parties.

temporal rules" – Article 51 is simply entitled "Rules of Procedure and Evidence." However, whether a certain rule of criminal procedure can be included within the group of "intertemporal rules" depends on its content, and whether it expresses a rule that commands that a specific procedure is only applicable in legal situations arising or ongoing after a change in the law has entered into force.[33] Applying this meaning, there can be no doubt that Article 51(4) of the Statute embraces intertemporal procedural rules.

The Appeals Chamber established that Article 51(4) of the Statute was applicable to the circumstances of the present case, whereas Article 24(2) should not be applied. Thus, the Appeals Chamber agreed with the Trial Chamber that the principle of non-retroactivity of procedural law before the ICC is governed solely by the specific provisions of Article 51(4) of the Statute. It found that, in principle, Article 24(2) of the Statute concerns substantive law. In order to understand the proper context of Article 24 of the Statute, the Article must be read as a whole. If paragraph 2 is read together with paragraph 1 it is clear that Article 24 of the Statute concerns only conduct giving rise to criminal responsibility. When invoking the rules of contextual interpretation, it should furthermore be noted that Article 24(2) is contained in Part 3 of the Statute, which pertains to general principles of criminal law. The Appeals Chamber thus concluded that the "law" referred to in Article 24(2) of the Statute is only the substantive law which relates to criminal conduct. It does not apply to amendments to the Rules of Procedure and Evidence. Before this judgment hat been rendered, the scope of application of Article 24(2) had been unclear. For example, B. Broomhall presumed that the "law applicable" in Article 24(2) "can only mean the 'applicable law' and that the Rules should be included within the term" – because if Article 24(2) is read by the Court as including the Rules within the term "law", then Article 24 will apply directly to have this effect.[34]

After clarifying the relationship between Article 24(2) and Article 51(2) of the Statute, the Appeals Chamber next considered whether the present situation falls within the scope of Article 51(4) – the only applicable norm in this context.

2.4. Admission of previously recorded testimonies – the consequences of the amendment of Rule 68

The second level of analysis of the Appeals Chamber's decision concerns the nature and scope of the procedural rules that were changed on the basis of the amendment. On 27 November 2013 the Assembly of States Parties amended Rule 68 RPE.[35] The amended Rule 68 expands the existing provisions regarding the admission of prior recoded testimony by including several additional situations in which the admission of

[33] *See* Paluszkiewicz (*Kilka uwag*), *supra* note 3, p. 342.

[34] *See* B. Broomhall, *Article 51*, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, Beck/Hart, München: 2016, p. 1344.

[35] Rules of Procedure and Evidence, as amended by resolution by the Assembly of States Parties, 12 November 2013, ICC-ASP/12/Res.7, available at: https://bit.ly/2wykERj (accessed 30 June 2018).

such testimony is allowed.[36] The Ruto and Sang case was the first instance of use of the amended Rule 68 in practice.[37]

The former Rule 68 provided for the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, under the condition that the witness who had given the previously recorded testimony:

- is not present before the Trial Chamber, and both the Prosecutor and the Defence had had the opportunity to examine the witness during the recording; or
- is present before the Trial Chamber, and 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.

Presently, Rule 68(2)(c) allows the Chamber to introduce previously recorded testimony also when the prior recorded testimony comes from a person who has subsequently died, or must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. In such a case the prior recorded testimony may be introduced if the Chamber is satisfied that the person is unavailable for the reasons mentioned above and that the prior recorded testimony has sufficient indicia of reliability. The crucial change was introduced in Rule 68(2)(d), which allows for the admission of the prior recorded testimony which comes from a person who has been materially influenced by an improper interference, including threats, intimidation, or coercion, which may relate, *inter alia*, to the physical, psychological, economic or other interests of the person. The fact that the prior recorded testimony goes to the proof of acts and the conduct of an accused may be a factor against its introduction, in whole or in part. In such a case this prior recorded testimony 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 an 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.

This norm complements Article 69(2) of the Statue, which introduces the principle of orality of proceedings. It also gives the exceptions to the general principle that "[t]he testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence."

[36] The Appeals Chamber decision of 12 February 2016.

[37] F. Gaynor, K.I. Kappos, P. Hayden, *Current Developments at the International Criminal Court*, 14(3) Journal of International Criminal Justice 623 (2016), p. 696.

Therefore, Rule 68 is a so-called "complementing legal norm", which gives a meaning and sets the scope of the statutory provision.

The Rule was adopted in order to ensure the expeditiousness and efficiency of proceedings by stream lining the presentation of evidence by increasing the instances in which prior recorded testimony could be introduced instead of examining the witness in person.[38] It is worth noting – as mentioned above – that the admission of prior recorded testimony also allows for admission of testimonies of witnesses who have been subjected to improper interferences. This possibility was adopted in order to facilitate the admission of initially recorded evidence of witnesses who were subsequently bribed, intimidated or who disappeared – specifically in the situation in Kenya. The new rule thus became a tool for using recorded testimonies of intimidated witnesses who – out of fear – refused to testify before the Court.[39]

How these rules were interpreted by the Court reflects a struggle of power between the Kenyan government and the Court. The rules even became part of political negotiations, as during the works on the amendments of the RPE Kenya argued that the Assembly of State Parties (ASP) had earlier agreed during the previous sessions that the changes to Rule 68 would not apply retroactively.[40] According to the opinion of the Kenyan government, the amendment was inconsistent with the Rome Statute's protection of defence rights. The ASP had agreed that the new rules would not adversely affect the cases already on trial before the Court. This was supposed to specifically relate to the cases concerning Kenya, including the Ruto and Sang case.[41]

Contrary to the opinion of the Kenyan government, it is clear that any reference in any of the formal resolutions to the formal interpretation of the amended Rule 68 which was adopted at the end of the Assembly would amount to a political interference in a matter being litigated in an ongoing ICC trial.[42] Thus giving such an assurance would infringe on the ICC's judicial independence. The Rome Statute does not allow

[38] According to the opinion expressed by the Assembly of States Parties to the Rome Statute of the International Criminal Court, Twelfth Session, The Hague, 20-28 November 2013, Official Records, Volume I, ICC-ASP/12/20, at 71, available at: https://asaticc-cpi.int/iccdocs/asp_docs/ASP12/OR/ICC-ASP-12-20-ENG-OR-vol-I.pdf (accessed 30 June 2018).

[39] As the Trial Chamber noted in this case: "[t]he element of systematicity of the interferences of several witnesses in this case which gives rise to the impression of an attempt to methodically target witnesses of this case in order to hamper the proceedings." *See* the Trial Chamber decision, para. 60. *See also* Gaynor, Kappos & Hayden, *supra* note 37, pp. 696-697.

[40] The true purpose, as it is indicated in the doctrine, was to handle the obstruction of the Kenyan Government – this rule allowed for admission of prior recorded testimony which comes from a person who has been subjected to interference – as it was the case in the situation of Kenya. *See* H. Woolaver, E. Palmer, *Challenges to the Independence of the International Criminal Court from the Assembly of States Parties*, 15(4) Journal of International Criminal Justice 641 (2017), p. 649.

[41] According to the documents cited by Woolaver & Palmer, *supra* note 41, p. 651, Kenya sought to have this interpretation affirmed by the ASP (p. 649).

[42] Civil society organizations had called on governments to reject the Kenyan request- specifically the Coalition for the ICC. *See* International Criminal Court independence under threat at annual assembly, available at: https://bit.ly/1Q8eZ5a (accessed 30 June 2018).

the ASP to adopt formal interpretations of the RPE – or to circumscribe the Chambers' interpretation of these Rules.[43] However, after rounds of negotiations, the ASP decided to include a special remark in the Official records of the fourteenth ASP – that Rule 68 would not be applied retroactively, as follows:

> the Assembly recalled its resolution ICC-ASP/12/Res.7, dated 27 November 2013, which amended rule 68 of the Rules of Procedure and Evidence, which entered into force on the above date, and consistent with the Rome Statute reaffirmed its understanding that the amended rule 68 shall not be applied retroactively.[44]

However, the same wording was not used in the resolution. On this basis the Appeals Chamber found in this case that these records, as opposed to resolutions, were irrelevant for the determination of the appeal.[45]

This discussion of the possible interpretations of the Rules shows how the Rules may be turned into a tool whereby the State Parties try to use the ASP to influence ongoing judicial proceedings. What's more, it also shows that the ASP potentially has the power to prescribe the judicial interpretation of the Rules: Firstly, it can pass a formal resolution interpreting a previously amended Rule (as the Appeals Chamber accepted, such a resolution would have an impact on its judicial interpretation). Secondly, the ASP can change the Rules by enacting Rule amendments. In this case, the ASP decided not to exert an exact influence on the Rule's judicial interpretation. However, in the struggle for power it is not clear that such self-restraint will be always the case, and the potential impact of political forces cannot be ignored.

The problem that arose before the ICC Appeals Chamber concerned the question whether the prior recorded evidence, which was deemed admissible under the new rule by the Trial Chamber but was not under the previous law, could be admitted in the ongoing trial (the trial started after 23 January 2012, when the Pre-Trial Chamber issued its *Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*), while it would clearly not be admissible if it was considered to have retroactive effect.

2.5. The scope of the notion of "retroactive" (Article 51(4) of the Statute)

A criminal trial is a phenomenon stretched out over time. Thus, changes in the rules pose the question of what limits, if any, should be placed on a new rule's application to trials that started before the adoption of the new rule?[46]

In analysing Article 51(4) of the Rome Statute the notions of "retroactivity" and "detriment" should be examined separately. The first step is to explain what the

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[43] As was observed by Woolaver & Palmer, *supra* note 40, p. 651.

[44] Assembly of State Parties, Official Records – 14th Session, para. 61, available at: https://bit.ly/2HHWJ7p (accessed 30 June 2018).

[45] The Appeals Chamber decision, para. 19.

[46] A paraphrase of the question asked by J.E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 Harvard Law Review 1055 (1997), p. 1055.

"retroactive application" of the law is, and whether such a retroactive application occurred in the Ruto and Sang case.

In order to make this assessment it was necessary to determine the point in time at which the procedural regime governing the proceedings became applicable to the parties, and in particular to the accused. According to the Appeals Chamber, the basis for assessing whether the application of a rule concerning the introduction of evidence at trial is "retroactive" should be the procedural regime at the commencement of the trial. Usually before the start of a trial the Prosecutor provides the accused with the names of witnesses the Prosecutor intends to call to testify and with the copies of any prior statements made by those witnesses, in accordance with Rule 76(1) of the Rules. The rules applicable to the introduction of the testimony of these witnesses are then part of the above-mentioned procedural regime. That regime, as it was in force at the commencement of the trial, governed the introduction of prior recorded testimony at the start of the trial, then changed during the course of the trial due to the amendment of Rule 68 RPE. Thus in the present case prior recorded testimony, consisting of incriminatory evidence which was admitted into evidence under the amended Rule 68, would not have been admissible under the former Rule 68 RPE. Under the previous regime, the evidence could only have been admitted by way of oral testimony. In consequence, the Appeals Chamber found that the amended Rule 68 was applied retroactively to the on-going trial proceedings within the meaning of Article 51(4) of the Statute.

The test it used was to assess whether "the overall position of the accused in the proceedings can be negatively affected by the disadvantage", i.e. whether his/her position was worse at the time of the amendment of the rules than it was when the trial started. Therefore all the amendments of procedural law that took place after the commencement of a trial were considered to be "retroactive." The Appeals Chamber invoked the doctrine of "vested rights" known from the Anglo-Saxon doctrine rather than the complex set of intertemporal rules that exist in states of continental law. The doctrine of vested rights was, however, tailored to its own purposes. The Court did not wish to rely strictly on that doctrine alone, choosing instead to base its decision on a more flexible assessment of the overall position of the accused. The ICC – as on numerous other occasions – elaborated a *sui generis* interpretation of intertemporal rules. Furthermore, although the text of Article 51(4) was based on a similar regulation which had been adopted before the *ad hoc* tribunals, the Appeals Chamber differentiated the interpretation of similar provisions in the Ruto and Sang case from the regulations and solutions applied before the UN *ad hoc* tribunals.

2.6. The scope of the notion of "detriment" (Article 51(4) Rome Statute)

The next factor that had to be considered was whether the application of the amended rule and admission of prior recorded statements that had not been admissible prior to the amendment was detrimental to the accused. The Trial Chamber adjudicating the case had based its interpretation of the notion "detriment" on whether the changes

resulted in prejudice to "the rights of the accused", but the Appeals Chamber disagreed. It stated that the there was nothing in Article 51(4) of the Statute that indicated that "detriment" must or may be limited only to such rights. The term "detriment" should be interpreted broadly and not be limited to prejudicing the rights of the person who is being prosecuted. It interpreted the notion of "detriment" in its ordinary, that is dictionary, meaning, which involves "disadvantage, loss, damage, or harm."[47] The Appeals Chamber applied – equally – a contextual, a teleological and a dictionary interpretation. In consequence, the Chamber decided that this broad literal meaning of the notion spoke against using only a limited understanding of the term. As Article 51(4) of the Statute concerns amendments to the Rules which relate to proceedings before the Court, including the admission of evidence, the notion of "detriment", within the meaning of Article 51(4) of the Statute, should be understood as "disadvantage, loss, damage or harm to the accused, including but not limited to, the rights of that person." Moreover, "it is not any disadvantage caused by the amendment of a rule that is sufficient for a finding of detriment under article 51(4) of the Statute. Detriment in the sense of article 51(4) of the Statute needs to meet a certain threshold, which is that the overall position of the accused in the proceedings be negatively affected by the disadvantage."[48] In consequence, the Appeals Chamber concluded that

> the application of the amended rule resulted in (i) additional exceptions to the principle of orality and restrictions on the right to cross-examine witnesses, and (ii) as a consequence, in the admission of evidence, not previously admissible in that form under former rule 68 of the Rules or article 69 (2) and (4) of the Statute which could be used against the accused in an article 74 decision.[49]

It results from the above considerations that "the application of this rule negatively affected the overall position of Mr. Sang and Mr. Ruto in the proceedings at hand."[50] Moreover, the Appeals Chamber invoked the interpretation and aim of Article 69 of the Statute, which allows for introducing prior recorded testimony on the basis of Rule 68 only if "these measures shall not be prejudicial to or inconsistent with the rights of the accused." It stressed that the interpretation of this provision should take into account the importance of the principle of orality as established in this provision. The Appeals Chamber did not elaborate on the procedural meaning of "detriment" or how it relates to any retrospective application of law. It did not discuss how it relates to the rights of the accused (as the Trial Chamber did), nor how it relates to due process rights. Nevertheless, this linkage between the notion of "detriment to the accused" as incorporated in Article 51(2) and the wider scope of procedural rights of the accused cannot be ignored.

There can be no doubt that a new provision which allows the prosecution to introduce a piece of evidence that was not admissible earlier changes the legal situation of the

[47] Appeals Chamber decision of 12 February 2016, paras. 76 and 78.
[48] *Ibidem*, para. 78.
[49] *Ibidem*, para. 95.
[50] *Ibidem*.

accused. The new rule in the Ruto and Sang case was introduced when the proceedings were in full course and the accused already knew the charges and the scope of the accusation, as well as the evidence that the prosecution intended to present in support of the charges. If the amendment of Rule 68 RPE had changed nothing with regard to the scope of admissible evidence, there would have been no detriment. In consequence, the Appeals Chamber adopted a casuistic approach instead of the approach taken by the Trial Chamber, which looked at the application of the amended rule in the abstract.

The Appeals Chamber had recourse to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) but decided that it would not follow the ICTY's interpretation of intertemporal rules. The Trial Chamber's ruling in this case had been consistent with the jurisprudence of the ICTY. In addition, the scope of admissibility of prior recorded statements before the ICTY had also been broadened when Rules 92 *quater* and *quinquies* of the ICTY Rules were introduced. Analogously to Rule 68(2)(c) and (d) of the ICC RPE, they allowed for the introduction of the prior recorded testimony of witnesses who subsequently died, became untraceable or too ill to testify or whose failure to attend had been influenced by an improper interference. However, the Rules of Procedure and Evidence before the *ad hoc* tribunals specifically referred to the rights of the accused: Rule 6(C) of the ICTY RPE states that: "[a]n amendment (of the Rules) shall enter into force immediately but shall not operate to prejudice the rights of the accused in any pending case."[51]

In case of *The Prosecutor v. Seselj*, the ICTY Trial Chamber decided that the application of those Rules of Procedure and Evidence that allowed for the admission of new evidence which had previously been inadmissible before did not prejudice the rights of the accused – since he/she could invoke the same rights as the prosecution and could as well request that the new rules of admissibility of evidence apply in order to get written statements and transcripts of testimony admitted. However, in this case the amendments had been introduced into the Rules more than a year before the trial began.[52] As a result, the accused had been informed more than a year in advance of the possibility that the prosecution might make use of these new procedures. However, in *The Prosecutor v. Milan Milutinovic et al.*,[53] the amendments were introduced during the course of the trial (Rule 92*bis* was modified on 12 September 2006) and allowed for the admission of statements or transcripts of a deceased relating to acts and conduct of an accused which had not admissible earlier. Although the defence argued that any probative value of this evidence should be substantially outweighed by the need to ensure a fair trial and that the admission of this evidence would be unduly prejudicial to

[51] Rule 6 (D) and (C) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, 29 June 1995, as amended: IT/32/Rev. 44 of 10 December 2009, last amended on 13 May 2015.

[52] ICTY, *The Prosecutor v. Vojislav Seselj*, Trial Chamber, Decision on the prosecutions consolidated motion pursuant to rules 89 (F), 92 bis, 92 ter and 92 quater of the rules of procedure and evidence filed confidentially on 7 January 2008, IT-03-67-T, 21 February 2008, paras. 33-37.

[53] ICTY, *The Prosecutor v. Milan Milutinovic et al.*, Trial Chamber, Decision on Second Prosecution Motion for Admission of Evidence Pursuant to Rule 92 Quater, IT-05-87-T, 5 March 2007, para. 8.

the accused, the ICTY Trial Chamber nevertheless decided that considering the entirety of the evidence, as requested by the prosecution, would help set the most significant parts of the events in question into the right context. The Chamber stated that it was "unable to identify any way in which admitting the evidence [would] unduly prejudice the rights of the Accused." Also in *The Prosecutor v. Ramush Haradinaj et al.* the ICTY Appeals Chamber noted that on re-trial the latest version of the Rules was to be applied by the Trial Chamber to the ongoing proceedings.[54]

The ICC Appeals Chamber chose a different path, as the text of Article 51(4) of the Statute differs from that applicable to the *ad hoc* tribunals, notably because the text does not contain the term "rights." There is no mention of "prejudice to the rights" – just "detriment." The assumption that only "rights" are embodied in Article 67 of the Statute would narrow down the application of Article 51(4).

The interpretation adopted by the Appeals Chamber is consistent with the one used in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, where the Trial Chamber stated that although Rule 68 had been amended by Resolution ICC-ASP/12/Res.7, the amended rule could not be applied retroactively to the detriment of the person who is being investigated or prosecuted. In this case the Chamber decided to apply the initial Rule 68 concerning prior recorded testimony. Thus, in the present decision the Appeals Chamber remained faithful to the ICC's earlier interpretation of the rule – even though in the previous decision no further reasons were given for this conclusion. To sum up: The problem of the retroactive application of procedural rules has become one further example of situations in which the ICC jurisprudence does not adopt ICTY solutions (a similar situation takes place where witness proofing is concerned). The ICC distinguished the interpretation of Article 51(4) of the Rome Statute from the one used for Rule 6(C) of the ICTY Rules of Procedure and Evidence based on textual differences in the two rules.

2.7. Consequences of applying the due process doctrine to procedural intertemporal law

The ICC's decision to forbid the retroactive application of amendments to the Court's Rules when doing so would be to the detriment of the accused defines the scope of application of the *lex retro non agit* principle to procedural criminal law. The Appeals Chamber has adopted the common law doctrine and has chosen the concept of "due process rights" over the idea of "intertemporal rules" known from the continental doctrine. The "right" of the accused not to have the new law applied, if it works to his/her detriment need not be included in the restrictively interpreted scope of rights under Article 67 of the Statute, as it refers to strictly procedural "rights of the accused." The right not to have new procedural rules applied to the detriment of a party to the proceedings should be perceived in the more general scope of "due process rights" (as

[54] ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Appeals Chamber, IT-04-84-A, 19 July 2010, para. 50, ft 159.

it is a defence right and the prosecution should not enjoy it). Therefore, intertemporal rules in the jurisprudence of the ICC have become another element of the broadly understood concept of "defence rights" and an element of a fair trial. For the ICC, intertemporal rules are not just a set of rules designed to resolve conflicts of law.

This decision is interesting as seen from the Polish perspective, as it comes during a time of extensive and frequent changes in Polish criminal procedure. Even though it is not seen by the legislator, in the Polish doctrine, intertemporal rules are described as "principles" of intertemporal law.[55] However, they cannot be included in the group of legal principles of criminal procedure, as they are rather directions as to the method of proceeding. Nevertheless, they have the character of a guarantee (for the suspect/accused), that has to be taken into consideration. They should not be understood as mere "technical rules" of operation of different states of law or "mechanisms",[56] and should not be limited to solely a mechanism of application of a procedural provision.[57] As participants of proceedings are not prepared for any changes in the law, intertemporal rules should serve to eliminate inequities resulting from such changes. From the jurisprudence it results that the rules of intertemporal law protect certain values. Changes to procedural laws require the legislator to take preventive measures in order to provide adequate guarantees for the accused. The prohibition of retroactive application of laws to the detriment of the accused should apply in both procedural as well as substantive criminal law. Retroactive laws are not accessible to the accused at the time when he takes crucial decisions as to his/her line of defence.[58] Retroactive laws are often characterized by a lack of notice, and/or by inadequate legislatorial consideration of past conditions.[59] This can be described as a violation of the vested rights of the accused – and a violation of vested rights occurs when due process rights are involved.[60] A situation whereby evidence that was not previously admissible becomes admissible later is not, however, a straightforward example of "vested rights" as it does not always prejudice the rights of the accused.

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[55] T. Pietrzykowski, *Podstawy prawa intertemporalnego. Zmiany przepisów a problemy stosowania prawa* [Basic issues of intertemporal law. Law changes and problems of applying the law], LexisNexis, Warszawa: 2011, pp. 60-61. *See also* H. Paluszkiewicz, *Zagadnienia intertemporalne w polskim prawie karnym procesowym* [Intertemporal issues in Polish criminal procedural law], in: J. Mikołajewicz (ed.), *Problematyka intertemporalna w prawie. Zagadnienia podstawowe. Rozstrzygnięcia intertemporalne. Geneza, funkcje, aksjologia*, C.H. Beck, Warszawa: 2015, p. 321. In criminal substantive law *see* Wróbel, *supra* note 1, p. 154.

[56] *See* Paluszkiewicz (*Studia*), *supra* note 3, p. 11.

[57] The notion of an "intertemporal mechanism" was used by A. Matukin-Szumlińska, *Obowiązywanie prawa karnego procesowego w miejscu i czasie. Prawo intertemporalne* [Application of procedural criminal law in place and time. Intertemporal law], in: P. Hofmański (ed.), *System prawa karnego procesowego. Zagadnienia ogólne*, Wolters Kluwer, Warszawa: 2013, p. 499.

[58] J. Popple, *The Right to Protection from Retroactive Law*, 13(4) Criminal Law Journal 251 (1989), p. 254.

[59] Editors, *Today's Law and Yesterday's Crime*, p. 120, citing E. E. Smead, *The Rule Against Retroactive Legislation; A Basic Principle of Jurisprudence,* 20 Minnesota Law Review 775 (1936), p. 775 and B. Smith, *Retroactive Laws and Vested Rights*, 5 Texas Law Review 231 (1927), p. 231.

[60] N. Duxbury, *Ex Post Facto Law*, 58(2) American Journal of Jurisprudence 135 (2013), pp. 135-161 and the case law mentioned there.

With regard to the ICC decision in Ruto and Sang, some concerns must be raised concerning the practical application of the Appeal Chamber's interpretation of Article 51(4) in relation to the amended Rule 68 RPE. In any case in which the amended Rule 68 may apply, a Trial Chamber must decide whether introducing prior recorded testimony is detrimental to the accused. If so, the evidence is inadmissible. This places another burden on the ICC judges. It adds a new element to the admissibility assessment with regard to prior recorded evidence, in addition to those elements specified in Article 69(4) of the Statute. It also adds one further condition to the admissibility rule under Article 69(2) – and this condition does not relate to the reliability of such evidence. A Chamber must also assess the overall situation of the accused using the test established by the Appeals Chamber in the *Ruto and Sang* case. It must take into account a number of factors, including the weight of the evidence and their connection to the core issues of the case, and it must assess whether the evidence is corroborative of other evidence.

When taking into consideration the procedural consequences of this decision – which certainly is favourable to the accused – it could be asked what the temporal limit of application of this provision is. If it is accepted that new evidence cannot be admitted to the detriment of the accused because of procedural rule changes during the course of the proceedings, what if the rule changes (hypothetically) after a sentence has been issued by the Trial Chamber and before an appeal is lodged? Could the new rule apply before the Appeals Chamber? It seems clear that the new rule should also not be applied to the detriment of the accused in the proceedings before the Appeals Chamber. It could also happen that a prior recorded statement was admitted into a proceeding in violation of the Rules, but later – when a case was transmitted to the Appeals Chamber – the RPE rule changed and the admission of such evidence would be legal and proper. In such a case two solutions can be used: one is to repeal the defective judgment and adjudicate the case anew, and the second is to recognize the previously illegal evidence. The first solution leads to the necessity to repeat the first-instance proceedings. But this is then repeated according to the new rules – and the piece of evidence can be admitted anyway. The second solution would save time and costs but appears to have consequences to the detriment of the accused. In addition, as the law did not allow for the admission of a certain piece of evidence, an appellate court cannot affirm the proceedings of the lower court that admitted such evidence.[61] Such a conclusion seems to be dictated from application of the rule of legal certainty and the fact that a person cannot bear the negative consequences that result from a violation of the law by a court. However, it would seem that the need for functionality in applying procedural rules speaks for the second solution. Adopting the first solution would lead to a situation where a judgment has to be revoked while the new trial would be handled in exactly the same way as was done previously – even though this trial had been deemed to be defective.[62]

[61] *See* D. Lerman, *Glosa do postanowienia SN z dnia 9 lipca 2015 r., III KK 375/14* [Commentary on the Supreme Court decision of 9 July 2015], 9 Prokuratura i Prawo 180 (2016), p. 182.

[62] Polish Supreme Court, decision of 9 July 2015, case no. III KK 375/14, 7 Orzecznictwo Sądów Polskich (2016), p. 980.

A rational application of the law should therefore lead to the conclusion that once a new rule enters into force, the previous violations lose their character as a violation of the law and consequently a change of a procedural provision can heal a defective judgment.[63]

CONCLUSIONS

In the times of increased repression and a search for new methods of combating crime, it often happens that the established rights of the accused are considered to be of lower value than the efficiency of the criminal trial. There can be no doubt that the legislator can introduce provisions limiting the rights of the accused – as long as they are in compliance with the constitution and international law – but at the same time it must also be borne in mind that the accused cannot prepare him/herself for these legislative "surprises." His/her due process guarantees can disappear during the course of an ongoing proceeding, and thus his/her legal situation change for the worse from one day to another. His/her whole line of defence can be based on the fact that some type of evidence is not admissible; and after the amendment of the provisions the defence strategy lies in ruins and it may seems to have been a better idea to have pled guilty – which is still possible but carries different (less favourable) consequences at this stage of the trial and is less beneficial. Such a case should not happen in a democratic state. The new rules disturb the rights of the "players" established under the former rules, and any alteration in the law is bound to disturb past rights.[64] The change upsets the expectation of the participants in a criminal trial which commenced based on the previous rules. In a democratic state there should be a legal obligation not to "surprise" an individual with a new solution which unfavourably changes his/her legal situation.[65] Similarly, as in the case of shaping the rules of procedure, also in the course of shaping the intertemporal rules the legislator should search for a "relative balance between the procedural rights of the accused and the victim and to secure effectiveness of the proceedings at the same time."[66] A tendency may be seen – also in continental procedural models (at least in the doctrine) – to assess changes to the procedural law from the perspective of constitutional criteria, in particular the principle of legal certainty, as well as the standards of a fair trial.[67]

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[63] *See* S. Waltoś, *Konwalidacja w procesie karnym* [Convalidation in criminal procedure], 4 Nowe Prawo 494 (1960), p. 494. *Differently* R. Kmiecik, *Commentary on decision of the Polish Supreme Court, decision of 9 July 2015, case no. III KK 375/14*, 7 Orzecznictwo Sądów Polskich 980 (2016), p. 980.

[64] *See* Woodhouse, *supra* note 6, p. 79.

[65] Polish Constitutional Tribunal, judgment of 24 October 2000, case no. SK 7/00, OTK 2000/7/256, Dz. U. (Journal of Laws) 2000, No. 92, item 1024; judgment of 3 December 1996, case no. K. 25/95, OTK ZU Nr 6/1996, at 501-502.

[66] *Ibidem*.

[67] Wróbel, *supra* note 1, p. 514. This tendency is also seen in the French literature: G. Mathieu, *L'application de la loi pénale dans le temps*, 1 Revue de science criminelle (1995), p. 263.

It should be noted that the intertemporal rules in Poland should be amended so as to contain a notion of due process rights when a decision has to be taken on whether to apply a new law in the course of an ongoing trial – or at least Polish courts should decide to follow this principle as a consequence of the fair trial principle. When an important public interest and an important personal interest collide, a court should take into consideration the necessity to respect lawfully acquired rights. However, there is no statutory grounds for this.

Finally, in the ICC case of Ruto and Sang it turned out that the Appeal Chamber's particular interpretation of the intertemporal rules embodied in the Statute had serious practical consequences. The epilogue of this decision is as follows: on 5 April 2016, Trial Chamber V(A) decided, by majority, that the case against William Samoei Ruto and Joshua Arap Sang be terminated. The parties have not appealed this decision. Since the Appeals Chamber decided that the evidence contained in the prior recorded testimony of witnesses must be completely disregarded, the Trial Chamber, after assessing the evidence in accordance with the statutory standard, according to which the guilt of the accused should be established beyond reasonable doubt, came to the conclusion that, after the Prosecution had finished presenting its evidence, it could not support a conviction beyond reasonable doubt. The prior recorded statements were statements by the five key Prosecution witnesses. Without them the Prosecution ended up with no convincing evidentiary material. The Prosecution argued that even without the admission of the prior recorded testimony pursuant to Rule 68 of the Rules, it would have presented sufficient evidence and that there was no scope for a decision of "no case to answer." The Prosecution was of the view that the removal of the prior recorded testimony of the "Concerned Witnesses" from the evidentiary record would not be fatal to its case. However, the Trial Chamber later, in its "Decision on Defence Applications for Judgments of Acquittal" decided that the proceedings should be declared a mistrial due to a troubling incidence of witness interference and an intolerable political intrusion that was reasonably likely to intimidate witnesses.[68] The ICC used the specific legal construction of a "mistrial", concluding that to continue the proceedings under such circumstances would be contrary to the rights of the accused, whose trial should not continue beyond the moment when it has become evident that no finding of guilt beyond all reasonable doubt can follow.[69] The consequences of this decision are specific: it is not an acquittal, and it is important to note that there is a difference between terminating a case and entering a judgment of acquittal, "and it is legally significant."[70] The charges were vacated and the accused were

[68] Decision on Defence Applications for Judgments of Acquittal, Trial Chamber, ICC-01/09-01/11, 5 April 2016.

[69] In this regard, the Chamber was "in full agreement with Judge Pocar of the International Criminal Tribunal for the former Yugoslavia, who has expressed this view on several occasions", e.g. *Partial Dissenting Opinion of Judge Pocar to the Prosecutor v. Goran Jelisić*, IT-95-10-A, Appeals Judgment, 5 July 2001, pp. 70-72. *See* Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11, 5 April 2016, para. 19.

[70] *See* https://www.icc-cpi.int/iccdocs/PIDS/publications/EN-QandA-Ruto.pdf (accessed 30 June 2018).

discharged from the process, without prejudice to their presumption of innocence or the Prosecutor's right to re-prosecute the case at a later time. The accused were found neither "guilty" nor "not guilty" of the crimes charged. An acquittal before the ICC, as in many other jurisdictions, would prevent the future re-prosecution of the accused for the same crimes. But, the case against Mr. Ruto and Mr. Sang has been "terminated" and it was thus made clear that they could be prosecuted again in future.