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No**.: ICC-01/12-01/18**
Date: **07 January 2022**

APPEALS CHAMBER

Before: **Judge Luz del Carmen Ibáñez Carranza, Presiding**
Judge Piotr Hofmański
Judge Solomy Balungi Bossa
Judge Rosario Salvatore Aitala
Judge Gocha Lordkpanidze

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF
THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD

Public

Public redacted version of "Defence Response to 'Prosecution's Appeal against the "Decision on second Prosecution request for the introduction of P-0113's evidence pursuant to Rule 68(2)(b) of the Rules"'"

Source: **Defence for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. Introduction

1. The Prosecution Appeal[1] is a thinly veiled attempt to circumvent the proper processes of rule amendment, vested in the Assembly of State Parties: the Prosecution seeks to use this appeal to change the legal framework governing Article 69(2) and Rule 68, and to do so at the very end of the Prosecution case. This attempt should not be countenanced by the Appeals Chamber.

2. Unlike the *ad hoc* Tribunals, the Rome Statute legal framework is based on a treaty, which was ratified by States on the understanding, set out in Article 21(3), that the provisions would be interpreted and applied in accordance with the strict principles of legality and the sources of law set out in Article 21(1) of the Statute. State consent and the need for certainty, as a form of procedural fairness for the defendant, underpin this framework.

3. The Prosecution's constant harking to the Chamber's duty to search for the truth ignores the cardinal right of defendants to confront the evidence led against them, and is predicated on a dangerous and fallacious assumption that the truth can be gleaned through an account that has not been subjected to any form of testing or scrutiny. A rush for justice should not ignore the realities of international criminal trials: that written witness accounts, taken by a party to the proceedings, often contain multiple inaccuracies and omissions, that can only be addressed and clarified with the benefit of professional interpreters and sworn testimony. Professional judges also cannot substitute for the role of the Defence or the role of cross-examination: a Judge cannot predict the lines of questioning or exhibits that might have been put to a witness if he testified, nor can a Judge predict the witness's response. This is also not a matter that can be cured through 'weight' since an untested assertion can be deserving of no weight if it is based on an identification error, a translation or transliteration error, or mistaken belief. For this reason, the drafters of the Rome Statute enshrined a presumption of orality in Article 69(2),[2] and further crafted specific exceptions that are triggered by well-defined criteria

[1] ICC-01/12-01/18-2075 ('Prosecution Appeal' or 'Appeal').
[2] ICC-01/05-01/08-1386, paras. 75-76: "In this respect, the Chamber recalls that article 69 (2) of the Statute provides that: 'The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence […]' The direct import of the first sentence of this provision is that witnesses must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality. The importance of in-court personal testimony is that the witness giving evidence under oath does so

and accompanied by procedural safeguards. The Majority Decision[3] fell squarely within the parameters of this framework and is consistent with the Statute as interpreted and applied in prior appellate case law. The Prosecution has failed to discharge their burden of demonstrating legal error or an abuse of discretion, or that the outcome of the Decision was materially impacted by any such error. For these reasons, the Appeal should be dismissed.

II. Confidentiality

4. Pursuant to Regulation 23*bis*(2) of the Regulations of Court, this response has been filed confidentially as it refers to confidential court transcripts. A public redacted version has been filed with this confidential filing.

III. Submissions

First Ground: The Prosecution fails to demonstrate that the Majority either misinterpreted or misapplied the notion of 'acts and conduct'

5. The Prosecution's first ground of appeal lacks any foundation. They have failed to demonstrate any legal error in the manner in which the Majority interpreted and applied the notion of 'acts and conduct' nor have they demonstrated that the outcome was vitiated by a legal error. The Majority defined the notion of acts and conduct in a manner that is consistent with legal precedent.[4] They then applied this notion in a manner that was consistent with Rule 68(1), which specifies that the application of this rule may not be prejudicial to the rights of the accused, and the discretionary criteria set out in Rule 68(2)(b)(i).[5] The outcome is entirely consistent with the legal precedents which the Prosecution itself relies upon. The Prosecution, as the appealing party, has also failed to demonstrate how the Majority's interpretation and application of Rule 68(2)(b) is inconsistent with its drafting history or its goals and objectives.

The Majority did not define or apply the notion of 'acts and conduct' in an overly broad manner

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under the observation and general oversight of the Chamber. The Chamber hears the evidence directly from the witness and is able to observe his or her demeanour and composure, and is also able to seek clarification on aspects of the witness' testimony that may be unclear so that it may be accurately recorded."

[3] ICC-01/12-01/18-1924 ('Decision').

[4] Decision, ICC-01/12-01/18-1924, para. 12.

[5] Decision, ICC-01/12-01/18-1924, paras 13-18.

6. The Prosecution rightly concedes that the Majority defined 'acts and conduct' in a correct manner; that is, as pertaining to the personal actions of the defendant.[6] The Prosecution have also failed to identify any findings, in which the Majority failed to apply this definition correctly, for example, by enlarging the scope of information falling under heading, beyond the paragraphs identified in the Prosecution Application. If anything, it would appear that the Majority applied the notion of acts and conduct to P-0113's evidence in an overly *narrow* manner, when viewed in light of ICTY/ICTR precedents that have shaped existing ICC case law.

7. The notion of acts and conduct must be given its plain meaning, but, in the context of allegations concerning a common plan, it extends to evidence that would establish the role, position or knowledge of the defendant concerning the common plan and acts committed pursuant to the common plan.[7] This includes evidence that the accused "knew or had reason to know that those crimes were about to be or had been committed by his subordinates".[8] Read in conjunction with the *CAR* Article 70 precedent cited at paragraph 15 of the Prosecution Appeal,[9] the Chamber would be obliged to exclude evidence that the Prosecution intends to use to establish the *mens rea* or conduct of the defendant, even if the evidence in question does not expressly name the defendant.

8. Viewed through this lens, it is clear that if anything, the Majority applied the notion of 'acts and conduct' in an overly narrow manner. For example, in its Application, the Prosecution included paragraphs that concern a January 2013 meeting attended by various members of the group, including a former supervisor of Mr Al Hassan named 'Adama'. P-0113's evidence further purports to describe [REDACTED].[10] Although P-0113 does

[6] Prosecution Appeal, ICC-01/12-01/18-2075, para. 6: "On the face of the Decision, the Majority directed itself properly as to the correct definition of the term "acts and conduct of the accused" for the purpose of rule 68(2), by limiting it to the accused's *personal* acts and omissions."
[7] *Prosecutor v. Karadžić*, Sarajevo Rule 92*bis* Decision, para. 5, cited in Prosecution Appeal, ICC-01/12-01/18-2075, fn. 35.
[8] *Prosecutor v. Karadžić*, Sarajevo Rule 92*bis* Decision, para. 5.
[9] Prosecution Appeal, ICC-01/12-01/18-2075, para. 15 citing ICC-01/05-01/13-1430 ("*CAR Article 70* P-242 Rule 68 Decision Decision"), para. 8: "When evaluating whether the prerequisites of Rule 68(2)(b) of the Rules are satisfied, the Chamber considers that it is not dispositive that P-242 does not know who made the relevant money transfer. The issue is rather how the Prosecution attributes the acts and conduct contained in P-242's prior recorded testimony. Rule 68(2)(b) evidence can only go 'to proof of a matter other than the acts and conduct of the accused'. In the present instance, the Prosecution clearly intends to use P-242's prior recorded testimony primarily to prove that Mr Babala made this money transfer to P-242. P-242's prior recorded testimony is therefore being submitted to prove the acts and conduct of Mr Babala".
[10] [REDACTED].

not name Mr Al Hassan, [REDACTED].[11] The content of P-0113's evidence [REDACTED] goes directly to the personal acts and conduct of Mr Al Hassan. The Majority did not, however, characterise this evidence as pertaining to the personal acts and conduct of Mr Al Hassan.

9. Similarly, whereas the Prosecution contends that the Majority concluded that P-0113's evidence concerning alleged crimes committed by the Islamic Police fell under the category of the acts and conduct of Mr Al Hassan,[12] the Majority made no such finding. Rather, the Majority referred to evidence concerning the acts and conduct of the Islamic Police in the context of *first*, the extent to which it was possible to extract the sections concerning Mr Al Hassan from the larger narrative concerning the Islamic Police, without distorting the meaning and reliability of the remaining evidence,[13] and *second*, its assessment of the prejudice stemming from the Prosecution's reliance on evidence that was <u>proximate</u> to the acts and conduct of Mr Al Hassan.[14] The Majority committed no legal error in doing so and acted in a manner that was consistent with the proper parameters of its discretion.

The Majority correctly exercised its discretion in rejecting the partial admission of P-0113's evidence due to the prejudice generated through the piecemeal introduction of his evidence

10. Rule 68(2)(b) sets out, as a *chapeau* requirement, that the evidence may not concern the acts and conduct of the accused. The Majority nonetheless concluded that the fact that evidence includes sections that concern the acts and conduct of the defendant does not operate as an absolute bar to the admission of this evidence, if it is <u>possible</u> to separate these sections in a manner that would allow the remainder to be considered for admission.[15] The Majority's approach follows the position adopted by Trial Chamber IX in *Ongwen*, where the Trial Chamber found that:[16]

> the presence of a limited reference to the accused in a prior recorded testimony does not entail, in and of itself, that the testimony cannot be introduced under Rule 68(2)(b)

[11] [REDACTED]. The evidence of P-0654 and P-0004 were cited in the Defence Response to the Prosecution's Application: ICC-01/12-01/18-1811-Conf, para. 17.
[12] Prosecution Appeal, ICC-01/12-01/18-2075, para. 17, citing Decision, ICC-01/12-01/18-1924, para. 14.
[13] Decision, ICC-01/12-01/18-1924, para. 14.
[14] Decision, ICC-01/12-01/18-1924, para. 16.
[15] Decision, ICC-01/12-01/18-1924, para. 13.
[16] *Ongwen*, ICC-02/04-01/15-596-Red, para. 13.

of the Rules when (i) the calling party indicates that it does not intend to rely on that reference and (ii) this reference is not of significance to the case or is, in any event, of limited importance and does not constitute the core of the testimony. Any such reference would in any case not be considered by the Chamber to establish the acts and conduct of the accused for the purposes of its final judgment. With this limited exception concerning peripheral discrete references to the accused – which must be evaluated on a case-by-case basis – the Chamber otherwise agrees with the Defence that 'statements cannot be submitted piecemeal' as this approach 'would lead to an artificial exercise' and possibly 'absurdity and re-litigation of the Rule 68 admission'.

11. The Prosecution, which is one organ, did not appeal this finding in *Ongwen*.[17] The *Ongwen* precedent also formed the basis of their application concerning P-0113's testimony in this case.[18] There is, moreover, an innate logic to this position. In order for evidence to be considered separately from the sections concerning the acts and conduct of the defendant, this evidence must be *capable* of being separated from such sections. If the sections concerning the acts and conduct of the defendant form a core component of the witness's evidence, then it would not be compatible with the Chamber's truth-finding process to rely on information that cannot be properly contextualized or understood without the benefit of information that is not in evidence. Similarly, the Chamber will not be able to make a reliable assessment of the intrinsic coherence of a statement if parts, which speak directly to the witness's knowledge, motives, and perspectives on the charged events, must be disregarded.

12. The approach adopted by the Majority and Trial Chamber IX on this point is also fully consistent with ICC case law concerning the appropriate methodology that should govern Rule 68 provisions. Indeed, in an earlier Rule 68(3) decision, the Trial Chamber as a whole rejected a Prosecution application to submit discrete paragraphs of witness statements into evidence through Rule 68(3), holding that:[19]

although the Prosecution may choose to rely on particular passages of a prior recorded testimony to present its case against the accused in some limited instances, it is the testimony as a whole which will be introduced pursuant to Rule 68 of the Rules. This

[17] The Prosecution opposed the Defence leave to appeal: ICC-02/04-01/15-622 para. 4.
[18] Prosecution Application, ICC-01/12-01/18-1727-Conf, para. 23 and fn. 34, citing *Ongwen*, ICC-02/04-01/15-596-Red, paras 60, 105, 216.
[19] ICC-01/12-01/18-987-Red, para. 13.

is consistent with the intent and language of this provision and also is necessary because the Chamber in most instances will still need to review the totality of the testimony to assess the overall credibility and consistency of the evidence provided by a witness.

13. The Chamber further expressed concern in relation to the 'highly selective' manner in which the Prosecution had chosen smaller passages for submission through Rule 68(3), from much lengthier statements.[20] This concern chimes with Trial Chamber IX's above deprecation of a 'piecemeal' approach to the admission of written statements pursuant to Rule 68(2)(b). The rationale underpinning these findings is that the Chamber must have the power to assess specific aspects of the witness's oral testimony by reference to the broader parameters and content of the witness's written evidence, in its totality. Given that the alternative to this approach would be to exclude, from the outset, statements that contain *any* reference to the acts and conduct of the defendant, the Majority's approach is logical, fair and consistent with the overarching goals and safeguards concerning Rule 68(2).[21]

14. The Prosecution has, moreover, conceded that while the Chamber retains the discretion to admit evidence in part (that is, after excising sections that pertain to the acts and conduct of the accused), the Chamber is not obliged to do so.[22] While the Prosecution had claimed that Chambers should "generally incline" to receive evidence in part since the Chamber "is much better placed to assess the relevance and probative value of prior recorded testimony received in part at the deliberations stage",[23] the Prosecution has adduced no legal foundation for suggesting that this equates to a legal obligation on the part of the Chamber to do so, and a reversible error if they do not. This claim is also irrelevant, or at best, wholly speculative. The Majority's decision did not turn on the relevance or probative value of P-0113's evidence: if the Majority had concluded that the criteria for

[20] ICC-01/12-01/18-987-Red, para. 14.
[21] ICC-ASP/12/37/Add.1, para. 12: "an explicit reference to the rights of the accused was added, to draw attention expressly to this fundamental protection in the context of exceptions to the principle of orality."
[22] Prosecution Appeal, ICC-01/12-01/18-2075, para. 20 "The Majority not only purported to accept the established test defining the "acts and conduct of the accused" but also acknowledged that "the presence of limited references to the acts and conduct of the accused in a prior recorded testimony does not *per se* bar its introduction under [r]ule 68(2)(b)", and that "partial introduction of prior recorded testimony" is possible. Strictly speaking, this is a separate legal question. Once a chamber has established as a matter of law which, if any, passages of prior recorded testimony go to the acts and conduct of the accused, it then exercises its discretion under rule 68(1) and (2)(b)(i) to decide whether to admit the remainder of that testimony into evidence."
[23] Prosecution Appeal, ICC-01/12-01/18-2075, para. 7.

introduction were satisfied, there is every indication that the Majority would have deferred its substantive assessment of relevance and probative value to the judgment. The Prosecution, as the appealing party, has also failed to discharge its burden of demonstrating *first*, how the outcome of the Majority's determination would have changed if it had assessed such matters at the end of the trial as compared to the particular point when the Chamber issued its decision, and *second*, why such a hypothetical distinction justifies appellate review and revision.

15. The Prosecution's attempt to rely on the distinction between the submission and admission system of evidence is also a red herring.[24] The distinction between the two systems of evidence concerns the *timing* of the Chamber's determinations concerning relevance, reliability and prejudice, and not the *threshold* for such assessments. The Chamber is also duty bound to recognise Statutory bars to the introduction of certain types of evidence, including those set out in Rule 68. [25] Under the submission system, 'procedural bars' arising under either Article 69(7) or Rule 68 have been determined at the time of submission and not the time of judgment: the paramount consideration as to the prejudicial impact of receiving evidence in written form rather than *viva voce* is not diluted or deferred.[26] In the specific context of Rule 68(2)(b), this ensures fairness to both the Prosecution, who can elect to take steps to call the witness to testify if the Rule 68(2) application is rejected, and the Defence, who can then make an informed choice as to whether to call Defence evidence in relation to the particulars of that testimony.

16. Thus, although the *Ongwen* Trial Chamber deferred its full assessment of reliability and weight to a later stage, that Chamber made a threshold determination as to whether

[24] Cf Prosecution Appeal, ICC-01/12-01/18-2075, para 28 and fn. 51.

[25] *Bemba et al.*, ICC-01/05-01/13-2275-Red, paras 556, 572, 576, 581-582: "In addition, the legal instruments of the Court provide that testimonial evidence may only be relied upon by the parties when the person appears to testify at trial or, when previously recorded, under certain conditions, such as those under rule 68 of the Rules or when measures under article 56 of the Statute have been taken. Evidence which is testimonial in nature is thus inadmissible – irrespective of the "purpose" for which it would be relied upon by a party – when not elicited orally or when the conditions for the introduction of the prior recorded testimony specifically provided for in the Court's applicable law are not met. The Appeals Chamber considers that a trial chamber is thus required to ensure that evidence which is affected by an exclusionary rule is ruled inadmissible under the applicable ground and is, therefore, disregarded in the decision on the guilt or innocence of the accused. This consideration is mandatory in nature"; See also ICC-02/11-01/15-773, para. 33.

[26] *Ongwen*, ICC-02/04-01/15-596-Red, paras 13, 16: "At the same, the Chamber recalls that the introduction of a prior recorded testimony is not permitted if it is prejudicial to or inconsistent with the rights of the accused as mandated by Rule 68(1) of the Rules. In this sense, the Chamber agrees with the Defence that, in any case, the Chamber 'must keep the rights of the accused at the forefront', and that under no circumstances can prior recorded testimonies be introduced when this is prejudicial to the fairness of the proceedings and, more specifically, the rights of the accused". See also ICC-01/05-01/13-2275-Red, paras 556, 572.

receive Prosecution evidence through Rule 68(2) provisions during the trial proceedings (and before the close of the Prosecution case).[27] Other Chambers following the submission system for evidence have done the same, and, employing the same methodology and criteria as the Majority, have rejected Rule 68(2) applications where the Prosecution has failed to justify the necessity for "a deviation from the principle of orality" or to otherwise satisfy the "cautious and stringent assessment" required for such measures.[28] As explained by the Appeals Chamber in *Gbagbo & Blé Goudé*, whereas the Chamber may defer its full consideration of issues of substantive reliability (as opposed to formal reliability) to the final judgment,[29] the Chamber must make a preliminary assessment of various criteria that are relevant to the Chamber's assessment of prejudice.[30] The Majority thus committed no legal error by following the approach that was specifically endorsed by the Appeals Chamber in *Gbagbo & Blé Goudé* and *Bemba et al*., and applied consistently by other Chambers that utilise the submission system of evidence.

17. Any exercise of discretion must also be exercised in a manner that is consistent with the dictate in Rule 68(1) that the introduction of statements through any of the sub-rules may not be prejudicial to or inconsistent with the rights of the accused. This requirement imposes a broad obligation on the Chamber to ensure that the process of receiving such evidence is not incompatible with the right of the Defence to challenge all relevant aspects of the testimony or with the principle of equality of arms (i.e. bearing in mind the privilege that the Prosecution enjoys by virtue of the fact that they have been able to elicit evidence from the individual in relation to aspects that were relevant to the Prosecution case).

18. Notions of prejudice must also be assessed in light of the particularities of the evidence, the charges, and the circumstances of the case as a whole.[31] In line with ICTY precedents,

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[27] *Ongwen*, ICC-02/04-01/15-596-Red, paras 13, 16.
[28] ICC-01/09-01/20-247-Red, para. 22, citing the Majority Decision, ICC-01/12-01/18-1924, para. 18. See also *Ongwen*, ICC-02/04-01/15-596-Red, paras 13, 16.
[29] *Gbagbo & Blé Goudé*, ICC-02/11-01/15-744, paras 3, 102.
[30] *Gbagbo & Blé Goudé*, ICC-02/11-01/15-744, para. 72: "the Appeals Chamber is unpersuaded by Mr Gbagbo's argument raised under his second ground of appeal that considering the relative importance of witness evidence when deciding under rule 68 (3) of the Rules is not possible as an evaluation of evidence can only be carried out at the end of the trial once the Trial Chamber has heard all of the evidence. In the Appeals Chamber's view, rule 68 (3) of the Rules requires a Chamber to carry out a preliminary assessment of the evidence in question in order to determine whether its introduction under that provision is appropriate." See also para. 71 concerning the mandatory obligation to assess prejudice at this juncture.
[31] *Gbagbo & Blé Goudé*, ICC-02/11-01/15-744, para. 71.

there is no burden on the Defence to demonstrate prejudice or the necessity of subjecting the evidence to cross-examination: rather, the Chamber has an independent obligation to assess the need for cross-examination in light of its overriding duty to ensure the fairness of the proceedings.[32] It follows that if the process of disaggregating evidence that concerns acts and conduct for the remainder of the witness's testimony would unduly impede the ability of the Defence to contest either the coherence or reliability of the witness's evidence or the Prosecution's case concerning the knowledge, intent and participation of the defendant, then this constitutes grounds to reject the application. The Majority therefore correctly exercised its discretion in assessing the prejudice that would emanate through the 'piecemeal' submission of P-0113's evidence. Whereas the Prosecution has claimed that the Majority created a new 'acts and conduct' test,[33] the Prosecution has itself engineered confusion and error by shoe-horning findings concerning prejudice into the category of acts and conduct.

The Majority did not abuse its discretion or act unreasonably by taking into consideration the proximity of P-0113's evidence to the acts and conduct of Mr Al Hassan or the importance or disputed nature of such evidence

19. A further fatal flaw in the Prosecution's appeal is that even if the Majority erred in its definition of 'acts and conduct', this error did not invalidate the outcome of the Decision. This is because the Majority correctly exercised its discretion in considering the criteria set out in Rule 68(2)(b)(i), and excluded the evidence on the basis of such criteria.[34] This assessment was properly informed by the Majority's assessment as concerns the proximity of P-0113's evidence to the acts and conduct of Mr Al Hassan, and the significance of such evidence.

20. Rule 68(2)(b)(i) stipulates that even if evidence concerning the acts and conduct of the defendant are excluded, the Chamber must also consider whether the remaining evidence:

   a. relates to issues that are not materially in dispute;

   b. is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;

[32] *Prosecutor v. Lukić & Lukić*, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, para. 24.
[33] Prosecution Appeal, ICC-01/12-01/18-2075, paras 20-21.
[34] Decision, ICC-01/12-01/18-1924, paras 15-19.

c. relates to background information;

d. is such that the interests of justice are best served by its introduction; and

e. has sufficient indicia of reliability.

21. This is the approach that was followed by the Majority. The Majority adopted the same definition of acts and conduct that was proposed by the Prosecution, and which has been applied by other ICC Chambers.[35] The Majority then examined P-0113's statement, after the specific portions concerning the defendant's acts and conduct had been excised. The Chamber subsequently concluded, in line with the above criteria, that P-0113's evidence concerned disputed issues of material importance to the case, including evidence that was likely to be relied upon to establish issues concerning the responsibility of Mr Al Hassan.[36] The evidence was also not purely cumulative or corroborative.[37] These considerations formed the basis for its decision to reject the Application.

22. Moreover, whereas the Prosecution argues that the Majority approach is out of sync with ICTY and ICTR precedents,[38] the opposite is true. In *Galić*, the ICTY Appeals Chamber clarified that even if the definition of acts and conduct is confined to the personal acts and omissions of the defendant, the Chamber must still be mindful of the prejudice that could arise from relying on evidence that ties the defendant to the common plan and the actions of others within that common plan. The Appeals Chamber thus found that:[39]

> The fact that the written statement goes to proof of the acts and conduct of a subordinate of the accused or of some other person for whose acts and conduct the accused is charged with responsibility does, however, remain relevant to the Trial Chamber's decision under Rule 92*bis*. That is because such a decision also involves a further determination as to whether the maker of the statement should appear for cross-examination. (…) Where the evidence is so pivotal to the prosecution case, and where the person whose acts and conduct the written statement describes is so proximate to the accused, the Trial Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form. **An easy example of**

[35] Decision, ICC-01/12-01/18-1924, para. 12.
[36] Decision, ICC-01/12-01/18-1924, para. 16.
[37] Decision, ICC-01/12-01/18-1924, para. 17.
[38] Prosecution Appeal, ICC-01/12-01/18-2075, para. 14.
[39] *Prosecutor v. Galić,* Decision on Interlocutory Appeals concerning Rule 92bis(C) 7 June 2002, para. 13.

where the exercise of that discretion would lead to the rejection of a written statement would be where the acts and conduct of a person other than the accused described in the written statement occurred in the presence of the accused.

23. Similarly, in *Ngirabatware,* the IRMCT Appeals Chamber concluded that although the Trial Chamber had adopted an overly broad definition of 'acts and conduct', the Chamber correctly exercised its discretion in rejecting the statement in question, due to the overriding public interest in hearing oral evidence, which concerned the acts and conduct of a person of interest to the charges, rather than through a written statement.[40] The IRMICT further confirmed the ongoing validity of the *Galić* edict that "where the evidence is so pivotal to the prosecution case, and where the person whose acts and conduct the written statement describes is so proximate to the accused, the Trial Chamber may decide that it would not be fair to the accused to permit the evidence to be given in written form".[41]

24. In terms of other examples of such a proximate relationship: in *Hadžić,* the Trial Chamber found that evidence concerning the acts and conduct of an individual that enjoyed a hierarchical superior-subordinate relationship with the accused was relevant to the exercise of its discretion as to whether to reject the Rule 92*bis* application;[42] and in *Dordević,* the Chamber found that evidence concerning the location of an exhumation site on property allegedly belonging to a co-perpetrator ought to be subjected to cross-examination.[43]

25. The above determinations are directly applicable to the testimony of P-0113. While the Prosecution Application did not purport to rely on specific paragraphs referring to Mr Al Hassan's presence at certain meetings, the Prosecution was relying on the remainder of P-0113's evidence concerning the content of these meetings, which included discussion of complaints concerning alleged crimes committed by the Islamic Police.[44] The Majority further observed that the Prosecution was seeking to establish, through other evidence, that Mr Al Hassan attended such meetings and, through its P-0113 Application, was

[40] *Prosecutor v. Ngirabatware,* Appeals Judgment, paras 102-104.
[41] *Prosecutor v. Ngirabatware,* Appeals Judgment, para. 102.
[42] *Prosecutor v. Hadžić*, Rule 92*bis* Decision, para. 18.
[43] *Prosecutor v. Dordević,* Decision On Prosecution's Motion for Admission of Transcripts of Evidence of Forensic Witnesses in Lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, para. 13.
[44] Decision, ICC-01/12-01/18-1924, para. 16.

introducing evidence that would implicate Mr Al Hassan's personal *mens rea* concerning the commission of crimes (through Mr Al Hassan's knowledge of complaints discussed during such meetings).[45]

26. The Majority therefore rightly concluded that the introduction of his evidence would not be consistent with the Chamber's primordial duty to ensure the fairness of the proceedings. P-0113's evidence also addresses [REDACTED].[46] The attribution of such acts to the Islamic Police (as opposed to other organs) is a live and highly disputed issue in the trial proceedings.[47] This type of evidence is directly analogous to ICTY/ICTR precedents rejecting written evidence concerning the acts and conduct of subordinates. The Chamber was therefore *obliged* to exclude P-0113's evidence by virtue of the chapeau requirement of Rule 68(1) concerning prejudice and *empowered* to exclude it by reference to the discretionary criteria set out in Rule 68(2)(b)(i). The Prosecution has in fact conceded this point in its Appeal.[48]

27. There is also no compelling justification for the ICC Appeals Chamber to depart from these ICTY/ICTR precedents as concerns the relevance of proximate conduct to the Chamber's discretionary power to reject evidence under Rule 68(2)(b). It is clear from the drafting history that the Working Group on Amendments considered that it would be

[45] Decision, ICC-01/12-01/18-1924, para. 16, referring at fn. 25 to "Trial Brief, ICC-01/12-01/18-819-Conf-AnxA, para. 170."
[46] [REDACTED].
[47] [REDACTED]; ICC-01/12-01/18-T-139-Red-ENG ET, p. 68, line 25 to p. 69, line 16:
"Mr Witness, did Hamed Moussa work for the police at the BMS?
A. [15:42:11] Yes, he worked there. He worked there.
Q. [15:42:15] Now, Mr Witness, did the people working for Mohamed Moussa wear a vest?
A. [15:42:40] Yes, they did.
Q. [15:42:43] And what did those vests look like?
A. [15:43:04] Blue. And there was writing on the vests in both Arabic and French.
Q. [15:43:16] Did anyone tell you what the writing meant?
A. [15:43:51] That's what everyone said, that it -- it was written "police". That's "police" in French and in Arabic. That's what people said.
Q. [15:44:07] Mr Witness, is it correct that you don't know what the word "*Hesbah*" means?
A. [15:44:32] No, I don't. That's how it was written, but I didn't ask.
Q. [15:44:42] Mr Witness, was it difficult for you to distinguish between the different Islamists and the different sections they worked for?
A. [15:45:16] We don't know, but everyone called them the "Islamists". And that's all."
[48] Prosecution Appeal, ICC-01/12-01/18-2075, para. 18: "Out of candour, it should be acknowledged that the *Galić* Appeals Chamber further contemplated the possibility that, in certain circumstances, the events described by a witness could not be properly assessed as the "acts and conduct of the accused" and yet still be so "pivotal" to the Prosecution case or "proximate" to the accused that a chamber may properly exercise its discretion not to receive the evidence without cross-examination.But—as was expressly emphasised in *Galić*—"the rejection of the written statement in any of these situations is *not* based upon any identification of that [third party]'s acts or conduct with the acts or conduct of the accused." At this Court, such questions may potentially (but not necessarily) fall to be considered within the context of a chamber's discretion to receive prior recorded testimony in accord with the factors in rule 68(2)(b)(i)(…)".

inappropriate to apply a more permissive approach in connection with Rule 68(2)(b), as compared to Rule 68(2)(c), since the witness could, if the application is rejected, be called to testify.[49] It is, however, striking that the Prosecution Appeal is silent as concerns whether the Prosecution has requested the Chamber to issue a summons to secure P-0113's testimony. If P-0113's testimony is vital to the Prosecution's case or the establishment of the truth, then the cardinal principles of necessity and proportionality dictate that the Prosecution should exhaust all available means to secure his testimony, before calling for the Chamber to accept his testimony in a format that prejudices core Defence rights. The Majority thus rightly concluded that:[50]

> While the Chamber's truth seeking functions are of course of relevance, the fact that a witness is unwilling to testify before the Court cannot in itself be sufficient to shift the balance in favour of introducing under Rule 68(2)(b) of the Rules a prior recorded testimony which contains evidence which is uncorroborated, and which goes to crucial and highly contested matters.

Second Ground: The Prosecution has failed to demonstrate that the Chamber improperly fettered its discretion concerning the manner in which it interpreted and applied Rule 68(2)

28. The second ground of appeal can be dismissed from the outset due to the fact that any error on the part of the Majority did not vitiate the outcome of its determination.

29. Although the Prosecution clearly disagrees with the outcome, that is not sufficient to trigger appellate review: the Prosecution must discharge the burden of demonstrating that no reasonable Trial Chamber could have reached such an outcome on the basis of the information before it.[51] The Prosecution has failed to do so. As explained in relation to the First Ground, the Majority's approach was fully consistent with the same ICTY and

[49] ICC-ASP/12/37/Add.1, para. 30: "Under rule 68(2)(c)(ii), the fact that prior recorded testimony goes to proof of the "acts and conduct" of the accused may be a factor against its introduction, although the introduction of such evidence is not prohibited. Due to the additional burdens placed on parties in the case of unavailable witnesses—in the case of rule 68(2)(b), the parties retain the option to call an absent witness, while such an option is excluded by definition from rule 68(2)(c)—it was considered that provision should be more permissive of "acts and conduct" evidence."
[50] Decision, ICC-01/12-01/18-1924, para. 18.
[51] *Bemba et al.*, ICC-01/05-01/13-2275-Red, para. 98; *Prosecutor v. Prlić*, Appeal Judgement, para. 21; *Prosecutor v. Stanišić & Župljanin*. Appeal Judgement, para. 20; *Prosecutor v. Stanišić & Simatović*, Appeal Judgement, para. 18; *Prosecutor v. Tolimir*, Appeal Judgement, para. 11; *Prosecutor v. Kvočka et al.*, Appeal Judgement, para. 18; *Prosecutor v. Tadić*, Appeal Judgement, para. 64.

ICTR legal precedents, which the Prosecution urges the Appeals Chamber to follow. Furthermore, unlike the ICC, the *ad hoc* Tribunals deleted the presumption of orality from their legal framework.[52] It follows that even if the Majority had erred by placing emphasis on the presumption of orality and the exceptional nature of Rule 68(2)(b), this error did not affect the outcome of their assessment, which was consistent with approaches that do not subscribe to a presumption of orality.

30. In any case, the Prosecution has failed to demonstrate that the Majority abused its discretion in a manner that would justify appellate intervention.

31. The appellate case law, promulgated over the last thirteen years, has carefully considered and interpreted Rule 68 of the Rules of Procedure and Evidence, and its relationship to Article 69(2), within the boundaries of the specific Rome Statute framework. In such judgments, the Appeals Chamber has underscored that:

    a. Article 69 sets out the general principle that "witnesses must appear before the Trial Chamber in person and give their evidence orally. This sentence makes in-court personal testimony the rule, giving effect to the principle of orality";[53]

    b. Rule 68 constitutes an exception to the principle of orality set out in Article 69(2);[54] and

    c. the provisions of Rule 68 are "strict"[55] and must be subject to a "cautious" assessment.[56]

32. The amendments to Rule 68 did not alter the application of these evidential principles to Rule 68(2)(b): in *Gbagbo & Blé Goudé*, the Appeals Chamber explained that after Rule 68 was amended, the *Bemba* appellate principles continued to govern Rule 68(2), whereas Trial Chambers were afforded more discretion as concerns the application of Rule 68(3).[57] In *Gbagbo & Blé Goudé*, the Appeals Chamber continued to emphasise that since

[52] ICC-ASP/12/37/Add.1, Annex II.A, para. 4.
[53] *Gbagbo & Blé Goudé*, ICC-02/11-01/15-744, para. 65, citing *Bemba*, ICC-01/05-01/08-1386, para. 76.
[54] ICC-01/09-01/11-2024, para. 84.
[55] *Gbagbo & Blé Goudé*, ICC-02/11-01/15-744, para. 65, citing ICC-01/05-01/08-1386, para. 77.
[56] *Bemba*, ICC-01/05-01/08-1386, paras 3, 78: "In deviating from the general requirement of in-court personal testimony and receiving into evidence any prior recorded witness testimony a Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally. In the view of the Appeals Chamber, this requires a cautious assessment."
[57] ICC-02/11-01/15-744, para. 68: "In this regard, the Appeals Chamber notes that no significant amendment was made to rule 68 (3) of the Rules, while the aforementioned factors referred to in the Bemba OA 5 OA 6

Rule 68 constitutes an exception to the principle of orality, its application was subject to "strict conditions",[58] which should be assessed in a cautious manner.[59]

33. This was the appellate case law that was in force for the commencement and duration of the Prosecution case. The Majority Decision falls squarely within the boundaries of this framework and is consistent with the drafting history of the amendments, which resulted in Rule 68(2)(b).[60] The Prosecution has failed to demonstrate any convincing or compelling basis for departing from this consistent framework of appellate interpretation, retrospectively and to the detriment of Mr Al Hassan.[61]

34. Although the Prosecution has attempted to rely on the recommendations for the Independent Expert Review of the Court ('the Expert Group') to justify such a deviation,[62] the Expert Group specified that: "[t]here is no recommendation to be made on this subject other than to maximise the use of technology in the presentation of evidence insofar as that is consistent with the interests of justice, and to maintain vigilance with respect to taking advantage of any currently available technological facilities that can be deployed".[63] Of further significance, when Rule 68 was amended, it was the understanding of the ASP and the Working Group that the Court did not have the power

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Judgment were specifically inserted into the new rule 68 (2) (b) of the Rules. In the Appeals Chamber's view, this implies that greater discretion was intended to be accorded in respect of the application of rule 68 (3) of the Rules".

[58] ICC-02/11-01/15-744, para. 77.

[59] ICC-02/11-01/15-744, para. 69; see also *Ruto & Sang*, ICC-01/09-01/11-2024, paras 84-85.

[60] Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 31 October 2013, ICC-ASP/12/37/Add.1, Annex II.A, para. 4: "It is nonetheless important to consider the differences between the ICC and the ICTY when making amendments based on ICTY Rules. In the current case, it should be borne in mind that on the one hand, the ICTY is a more adversarial based legal system than the ICC, and this may mean that specific ICTY rules do not always translate into the ICC statutory scheme. On the other hand, the ICTY's version of the principle of orality may be more permissive of exceptions than article 69(2) of the Statute.4 As a result, aspects of ICTY rules 92 *bis*, 92 *quater* and 92 *quinquies* have been adapted in the proposed amendment and language has been amended to reflect the ICC's statutory framework. The WGLL also notes that while the ICTY Rules were drafted by the ICTY judges, in the case of the ICC the Rules were originally drafted by States. When considering proposing potential amendments to the Rules, the Court is therefore required to take the additional step of examining the rationale for the original text of each rule". See also footnote 4, "Although meaningful insight can be gained from the ICTY in constructing this amendment proposal, the tensions created by adding exceptions to the right of the accused to examine witnesses against him or her should be borne in mind"; and para. 5, "Thus, the principle of orality enshrined in article 69(2) is a general principle. Rule 68 is an exception to this principle, and considering possible amendments to the Rules on admitting prior recorded testimony is largely an exercise in considering other possible exceptions."

[61] *Gbagbo & Blé Goudé*, ICC-02/11-01/15-172, para. 14: "the Appeals Chamber has previously stated that absent "convincing reasons" it will not depart from its previous decisions. Thus, in principle, while the Appeals Chamber has discretion to depart from its previous jurisprudence, it will not readily do so, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions".

[62] Prosecution Appeal, ICC-01/12-01/18-2075, para. 5.

[63] Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, 30 September 2020, para. 554.

to compel witnesses to testify. The Working Group thus advocated amending Rule 68 as a mechanism to address this gap.[64] The Appeals Chamber subsequently confirmed that the ICC did have the power to compel witnesses to testify through summons issued by domestic authorities.[65] It follows that if anything, subsequent developments militate against, rather than for, a more permissive approach to Rule 68.

35. The Appeals Chamber has, moreover, emphasized the broad nature of the discretion vested in the Trial Chamber as concerns its consideration of factors related to Rule 68(2)(b) applications. The Chamber is not restricted to factors set out in this list but is free to consider other matters that might inform its assessment of reliability.[66] While the Majority's Decision was "informed" by various factors,[67] including the principle of orality, there is no indication that the Majority unreasonably or arbitrarily concluded that it was obliged to reach a certain outcome by virtue of such factors. Rather, the outcome was based on a careful consideration of the specific features of the evidence and charges in this case. This included the factors set out in Rule 68(2)(b).[68] The Majority also considered the goals of judicial economy and expedition in light of the particular characteristics of P-0113's evidence and concluded that the Prosecution had failed to demonstrate that the introduction of P-0113's evidence would promote judicial economy.[69] The Majority further weighed the Chamber's truth-seeking functions and balanced the impact on the Prosecution's case triggered by P-0113's unwillingness to testify against the risk of introducing untested "evidence which is uncorroborated, and which goes to crucial and highly contested matters".[70] There is no basis, therefore, for concluding that the Majority erred by considering factors that fall within this broad remit of discretion.

[64] ICC-ASP/12/37/Add.1, Annex II.A, para. 6: "The difficulties inherent in introducing prior recorded testimony under the current rule 68 are exacerbated by the fact that the Chamber has no power to compel a witness to appear before the Court. Rule 65 provides that once a witness appears before the Court, that witness may be compelled to provide testimony, however no general subpoena power exists in the Rules. In contrast, the ICTY Rules do allow the Chamber to issue subpoenas. The difficulty in compelling a witness to appear before the Court increases the need to develop more flexible and efficient processes for the introduction of prior recorded testimony, while also having due regard to the principles of fairness and the rights of the accused."
[65] *Ruto & Sang*, ICC-01/09-01/11-1598, paras 1-2.
[66] *Gbagbo & Blé Goudé*, ICC-02/11-01/15-744, para. 103: "Trial Chambers retain discretion to consider those factors that may be relevant to its determination on a case-by-case basis".
[67] ICC-01/12-01/18-2034, para. 7.
[68] Decision, ICC-01/12-01/18-1924, paras 16-19.
[69] Decision, ICC-01/12-01/18-1924, para. 18.
[70] Decision, ICC-01/12-01/18-1924, para. 18.

36. The Chamber's application of a "cautious and stringent assessment" cannot constitute the foundation for error. Since a cautious and stringent assessment simply impels the Chamber to give cautious and stringent consideration to the factors set out in Rule 68, it does not in itself presuppose a specific result. Similarly, given that the Appeals Chamber has characterised Rule 68 as an exception to the principle of orality,[71] the Majority did not abuse their discretion by referring to Rule 68(2)(b) as "a deviation from the general principle of orality enshrined in Article 69(2) of the Statute".[72] The appeal begs the question as to whether an exception to a general principle should be treated as exceptional:[73] to ask the question is to answer it. There is no definitional difference between a rule being qualified as an exception, and applying a rule on an exceptional basis.[74] Otherwise, there would be a risk that the exception would swallow the rule, and render the statutory protection of Article 69(2) meaningless.

37. Article 21(3) of the Statute also requires the Court to have regard to internationally recognised fair trial protections, which encompasses the right, on the part of a defendant, to confront their accuser. The European Court of Human Rights has underscored that the effective application of this right requires Courts to give effect to a general presumption of in-court testimony, in the presence of the accused, which is tested by adversarial argument.[75] In circumstances where the defendant has not had the opportunity to question or confront the witness, Courts should only rely on written evidence, in lieu of oral evidence, as a last resort, irrespective as to the importance of the evidence in question.[76]

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[71] *Ruto & Sang*, ICC-01/09-01/11-2024, para. 84; *Bemba*, ICC-01/05-01/08-1386, paras 77-78.
[72] Decision, ICC-01/12-01/18-1924, para. 18.
[73] In *Bemba*, the Appeals Chamber clarified that the principle of orality, enshrined in Article 69(2), means that *viva voce* testimony is the rule, and written evidence, the exception: ICC-01/05-01/08-1386, paras. 75-76.
[74] The plain meaning of exceptional is that it forms an exception: 'Exceptional' (adj.) Merriam-Webster
[75] *Al-Khawaja and Tahery v. the United Kingdom* ([GC], nos. 26766/05 and 22228/06, para. 118: "Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of proceedings".
[76] *Al-Khawaja and Tahery*, para. 175: "Finally, given the extent to which the absence of a witness adversely affects the rights of the defence, the Court would emphasise that, when a witness has not been examined at any prior stage of the proceedings, allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort. Before a witness can be excused from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable." See also para. 120: "The requirement that there be a good reason for admitting the evidence of an absent witness is a preliminary question which must be examined before any consideration is given as to whether that evidence was sole or decisive. Even where the evidence of an absent witness has not been sole or decisive, the Court has still found a violation of Article 6 §§ 1 and 3 (d) when no good reason has been shown for the failure to have the witness examined (…). As a general rule, witnesses should give evidence during the trial and all reasonable efforts will be made to secure their attendance."

The Majority Decision gave full effect to these principles; conversely, it would be contrary to Article 21(3) for the Appeals Chamber to reverse the Majority's approach.

IV. Relief sought

38. The Defence respectfully requests that the Appeals Chamber **REJECT** the Appeal.

Melinda Taylor
Counsel for Mr Al Hassan

Dated this 7th Day of January 2022
At The Hague, The Netherlands