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No. ICC-01/12-01/18 OA4

Date: 13 May 2022

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF MALI

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

Public document

Judgment

**on the appeal of the Prosecution against Trial Chamber X's "Decision on second
Prosecution request for the introduction of P-0113's evidence pursuant to Rule
68(2)(b) of the Rules"**

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

The Office of the Prosecutor

Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Counsel for the Defence

Ms Melinda Taylor
Ms Kirsty Sutherland

Legal Representatives of Victims

Mr Seydou Doumbia
Mr Mayombo Kassongo
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REGISTRY

Registrar

Mr Peter Lewis

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecution against the decision of Trial Chamber X entitled “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules” of 15 November 2021 (ICC-01/12-01/18-1924),

After deliberation,

By majority, Judge Ibáñez dissenting,

Delivers the following

JUDGMENT

- 1) The “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules” of 15 November 2021 (ICC-01/12-01/18-1924) is confirmed.
- 2) The Registry is ordered to reclassify as “public” documents ICC-01/12-01/18-2071-Conf and ICC-01/12-01/18-2074-Conf.

REASONS

I. KEY FINDINGS

1. Rule 68 of the Rules must be treated as an exception to the principle of orality in article 69(2) of the Statute, and a trial chamber should take into account the exceptional nature of that rule as a whole in the interpretation and application of the individual criteria in rule 68 of the Rules. This view is consistent with the Statutory framework and the preference for live witness testimony in article 67 (“Rights of the accused”) and in article 69 (“Evidence”), giving effect to the principle of orality and the opportunity for an accused person to examine a witness directly, in full equality.
2. Under rule 68(2)(b) of the Rules, a trial chamber may find it appropriate to admit parts of a witness statement that relate to proof of a matter other than the acts and conduct of the accused. The ultimate decision as to the appropriateness of admitting only parts of a statement is discretionary and depends upon the circumstances before the chamber.

3. What constitutes prior recorded testimony going to proof of the “acts and conduct of the accused” under rule 68(2)(b) of the Rules may depend upon the nature of the charges in each case. Trial chambers must be mindful that that criterion is included as a safeguard for the conduct of a fair trial in full equality. On the other hand, trial chambers must be careful not to apply this concept in a manner that may defeat the objective of rule 68 of the Rules, or that may inhibit written testimony limited to contextual elements of crimes or background information that may be relevant to the charges.

II. INTRODUCTION

4. The proceedings that give rise to the present appeal revolve around the interpretation of rule 68(2)(b) of the Rules of Procedure and Evidence (hereinafter: “Rules”), particularly of the phrase “proof of a matter other than the acts and conduct of the accused”. The Prosecution challenges the decision of Trial Chamber X (hereinafter: “Trial Chamber”) rejecting its request to introduce the prior recorded testimony of witness P-0113, holding that parts of the testimony relate to matters going to proof of acts and conduct of the accused, while the other parts were not suited for partial admission (hereinafter: “Impugned Decision”).¹ The concerned testimony in this case, according to the Trial Chamber, went beyond background information as it covered issues materially in dispute.² The Trial Chamber found that the Prosecution failed to demonstrate how the introduction of the prior recorded testimony would contribute to judicial economy.³ In support of this conclusion, the Trial Chamber found that rule 68(2)(b) of the Rules, which is a deviation from the general principle of orality under article 69(2) of the Statute, must be applied according to a cautious and stringent assessment to ensure that its introduction is not prejudicial or inconsistent with the rights of the accused.⁴

¹ [Decision on second Prosecutor request for the introduction of P-0113’s evidence pursuant to Rule 68\(2\)\(b\) of the Rules](#), 15 November 2021, ICC-01/12-01/18-1924, para. 14.

² [Impugned Decision](#), para. 16.

³ [Impugned Decision](#), para. 18.

⁴ [Impugned Decision](#), para. 18.

5. The Prosecution raises two grounds under its appeal brief⁵ (hereinafter: “Appeal Brief”). The first ground alleges a misapplication of rule 68(2)(b) of the Rules, pursuant to which prior recorded testimony may be introduced subject to the conditions therein.⁶ The second ground alleges a misinterpretation of rule 68(2) of the Rules in light of the preference for oral testimony in article 69(2) of the Statute.⁷ In order to address these grounds of appeal, the Appeals Chamber will clarify the interpretation and application of rule 68(2)(b) of the Rules, and it will provide guidance on the exercise of discretion belonging to a trial chamber in deciding the appropriateness of partial admission of prior recorded testimony.

III. PROCEDURAL HISTORY

A. Proceedings before the Trial Chamber

6. On 16 December 2020, the Prosecution filed an application before the Trial Chamber pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (hereinafter: “Rules”), seeking to introduce into evidence the prior recorded testimony of witness P-0113 and associated material (hereinafter: “First Request”).⁸

7. On 26 March 2021, the majority of the Trial Chamber, Judge Prost dissenting in part,⁹ rejected, without prejudice, the Prosecution’s request.¹⁰

⁵ [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”](#), ICC-01/12-01/18-2075.

⁶ [Appeal Brief](#), paras 6-30.

⁷ [Appeal Brief](#), paras 31-47.

⁸ [Prosecution application under rule 68\(2\)\(b\) to introduce MLI-OTP-P-0113’s statement and associated material into evidence](#), ICC-01/12-01/18-1207-Conf. See also [Defence response to ‘Prosecution application under rule 68\(2\)\(b\) to introduce MLI-OTP-P-0113’s statement and associated material into evidence’](#), dated 18 January and notified on 19 January 2021, ICC-01/12-01/18-1252-Conf.

⁹ [Partially Dissenting Opinion of Judge Kimberly Prost](#), 14 April 2021, ICC-01/12-01/18-1402-Anx-Red, annexed to Third Decision on the introduction of prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules (hereinafter: “Judge Prost’s Partial Dissent to Third Decision”).

¹⁰ [Third Decision on the introduction of prior recorded testimonies pursuant to Rule 68\(2\)\(b\) of the Rules](#), 14 April 2021, ICC-01/12-01/18-1402-Red2 (original confidential version filed on 26 March 2021) (hereinafter: “Third Decision pursuant to Rule 68(2)(b)”), para. 2.

8. On 20 September 2021, the Prosecution filed a second application requesting admission of the prior recorded testimony of witness P-0113 and associated material (hereinafter: “Second Request”).¹¹

9. On 14 October 2021, the Defence filed a response and objected to the Prosecution’s Second Request.¹²

10. On 15 November 2021, the majority of the Trial Chamber, Judge Prost dissenting,¹³ rejected the Prosecution’s Second Request, finding that the introduction of witness P-0113’s prior recorded testimony would be prejudicial to the rights of the accused.¹⁴

11. On 22 November 2021, the Prosecution filed a request for leave to appeal the Impugned Decision, raising four issues.¹⁵ The issues for which the Prosecution sought leave to appeal were as follows:

1) Whether the exclusion of evidence going to the “acts and conduct of the accused” in rule 68(2)(b) means that any reference to such acts and conduct must not only be “peripheral and discrete” but also capable of being “detached from their context”.¹⁶

2) Whether considering rule 68(2)(b) as “a deviation from the general principle of orality” in article 69(2) of the Statute required an assessment which was not only cautious but “stringent” — in the sense that admissibility is “exceptional” and must be “further limited” by a broad

¹¹ [Prosecution second application under rule 68\(2\)\(b\) to introduce MLI-OTP-P-0113’s prior recorded testimony and associated material into evidence](#), ICC-01/12-01/18-1727-Conf (with one confidential annex) (hereinafter: “Prosecution’s Second Request”).

¹² [Defence response to ‘Prosecution second application under rule 68\(2\)\(b\) to introduce MLI-OTP-P-0113’s statement and associated material into evidence’](#), ICC-01/12-01/18-1811-Conf.

¹³ [Dissenting Opinion of Judge Kimberly Prost](#), 15 November 2021, ICC-01/12-01/18-1924-Anx, annexed to Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules (hereinafter: “Judge Prost’s Dissent to Impugned Decision”).

¹⁴ [Impugned Decision](#), para. 19.

¹⁵ [Request for Leave to Appeal the “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68\(2\)\(b\) of the Rules”](#), ICC-01/12-01/18-1966 (hereinafter: “Prosecution’s Request for Leave to Appeal the Impugned Decision”).

¹⁶ [Prosecution’s Request for Leave to Appeal the Impugned Decision](#), para. 5.

reading of the criteria specified in the rule itself in order to protect the rights of the accused.¹⁷

3) Whether the “interests of justice” criterion in rule 68(2)(b)(i) refers primarily to considerations of “judicial economy”, and only residually to “truth seeking functions”.¹⁸

4) Whether the “corroboration” criterion in rule 68(2)(b)(i) only favours the admissibility of qualifying evidence if it is “*entirely* corroborative or cumulative”.¹⁹

12. On 26 November 2021, the Defence filed a response to the Prosecution’s request, submitting that the request should be denied as the issues raised are not appealable under article 82(1)(d) of the Statute.²⁰

13. On 6 December 2021, the Trial Chamber granted leave to the Prosecution regarding the first and second issues,²¹ and rejected the Prosecution’s request as to the third and fourth issues.²²

B. Proceedings before the Appeals Chamber

14. On 13 December 2021, the Defence filed a request for extension of time to file its response to the appeal brief, pursuant to regulation 35 of the Regulations of the

¹⁷ [Prosecution’s Request for Leave to Appeal the Impugned Decision](#), para. 14.

¹⁸ [Prosecution’s Request for Leave to Appeal the Impugned Decision](#), para. 22.

¹⁹ [Prosecution’s Request for Leave to Appeal the Impugned Decision](#), para. 28.

²⁰ [Defence Response to ‘Request for Leave to Appeal the “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68\(2\)\(b\) of the Rules”’](#), ICC-01/12-01/18-1999, para. 2.

²¹ [Decision on Prosecution request for leave to appeal “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68\(2\)\(b\) of the Rules”](#), ICC-01/12-01/18-2034 (hereinafter: “Decision on Request for Leave to Appeal”), para. 9.

²² [Decision on Request for Leave to Appeal](#), para. 13.

Court.²³ The Appeals Chamber granted the request and gave a similar extension to the Victims for their response.²⁴

15. On 17 December 2021, the Prosecution filed its appeal brief requesting that the Impugned Decision be reversed and that the matter be remanded to the Trial Chamber.²⁵

16. On 7 January 2022, the Defence and Victims filed responses (hereinafter: “Defence’s Response” and “Victims’ Observations”, respectively).²⁶

IV. PRELIMINARY ISSUES

17. In its response to the Defence’s request for an extension of time to file its response to the appeal brief, the Prosecution notes that the Defence originally filed its request on a “confidential” basis. Thus, the Prosecution filed its response as “confidential”, and requested that the Appeals Chamber reclassify it as “public” at the appropriate time.²⁷

18. The Appeals Chamber notes that the Defence has filed a public version of its request. Thus, the Appeals Chamber finds it appropriate to order the Registry to reclassify both the Prosecution’s response to the request and the Appeals Chamber’s ruling on the request as “public”, pursuant to regulation 23*bis* (3) of the Regulations of the Court.

V. STANDARD OF REVIEW

19. Regarding errors of law, the Appeals Chamber has previously held that it

²³ [Defence Regulation 35 Request for Extension of Time to File Response to Prosecution Appeal of “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68\(2\)\(b\) of the Rules”](#), ICC-01/12-01/18-2067-Conf (public redacted version filed on 17 December 2021 (ICC-01/12-01/18-2067-Red)). See also Prosecution’s Response to “Defence Regulation 35 Request for Extension of Time to File Response to Prosecution Appeal of ‘Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules’”, 14 December 2021, ICC-01/12-01/18-2071-Conf (hereinafter: “Prosecution response to Defence’s request for extension of time”).

²⁴ Decision on Defence request for extension of time, 15 December 2021, ICC-01/12-01/18-2074-Conf, p. 3, paras 8-9.

²⁵ [Appeal Brief](#), para. 48.

²⁶ [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’”](#), ICC-01/12-01/18-2080-Conf (a public version was filed the same day (ICC-01/12-01/18-2080-Red)); *Réponse au mémoire d’appel du Procureur relative à la “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules”*, ICC-01/12-01/18-2081.

²⁷ Prosecution response to Defence’s request for extension of time, para. 2.

will not defer to the relevant Chamber's legal interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.²⁸

If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.²⁹ A decision is "materially affected by an error of law" if the chamber "would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error".³⁰

20. Regarding discretionary decisions, the Appeals Chamber will interfere with the exercise of discretion where the appellant can demonstrate that a chamber gave weight to extraneous or irrelevant considerations, or failed to give weight or sufficient weight to relevant considerations. The degree of discretion afforded to a chamber may depend upon the nature of the decision in question. In its review, the Appeals Chamber will not interfere with a chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. Moreover, even if an error has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to force the conclusion that the relevant chamber failed to exercise its discretion judiciously.³¹

²⁸ *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9"](#), 22 March 2016, ICC-01/04-02/06-1225 (OA2), para. 33; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [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"](#), 12 February 2016, ICC-01/09-01/11-2024 (OA10), para. 20; *The Prosecutor v. Uhuru Muigai Kenyatta*, [Judgment on the Prosecutor's appeal against Trial Chamber V\(B\)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87\(7\) of the Statute"](#), 19 August 2015, ICC-01/09-02/11-1032 (OA5) (hereinafter: "Kenyatta OA5 Judgment"), para. 23. See also Appeals Chamber, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Mohamed Ag Mahmoud*, [Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense'](#), 19 February 2020, ICC-01/12-01/18-601-Red (OA) (confidential version notified on the same day, ICC-01/12-01/18-601-Conf (OA)) (hereinafter: "Al Hassan OA Judgment"), para. 38.

²⁹ [Al Hassan OA Judgment](#), para. 38; Appeals Chamber, *The Prosecutor v. Simone Gbagbo*, [Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo"](#), 27 May 2015, ICC-02/11-01/12-75-Red (OA) (confidential version filed on the same day (ICC-02/11-01/12-75-Conf (OA)) (hereinafter: "Simone Gbagbo OA Judgment"), para. 40.

³⁰ [Al Hassan OA Judgment](#), para. 38; [Simone Gbagbo OA Judgment](#), para. 41.

³¹ *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled "Judgment"](#), 30 March 2021, ICC-01/04-02/06-2666-Red (A A2), para. 46; [Kenyatta OA5 Judgment](#), paras 22-25, referring to, *inter alia*, *The*

21. The analysis and determination of the issues arising from the Prosecution's two grounds of appeal will be guided by the standard of review as set out above.

VI. MERITS

A. Background and relevant part of the Impugned Decision

22. In its First Request, the Prosecution sought to introduce into evidence the prior recorded testimony and associated material of witness P-0113 because the witness was unwilling to testify *viva voce*.³² The Prosecution submitted that, except for nine paragraphs and one associated exhibit, witness P-0113's prior recorded testimony concerned proof of matters other than the acts and conduct of the accused,³³ with the prior recorded testimony being corroborative and cumulative in nature, and its admission being in the interests of justice.³⁴

23. The Defence objected, submitting that the paragraphs that the Prosecution sought to exclude were "not peripheral and discreet [*sic*] in nature but inseparable from the rest of P-0113's statement".³⁵ Furthermore, the Defence submitted that witness P-0113's prior recorded testimony relates to issues materially in dispute,³⁶ and addresses important claims that are not corroborated or are contradicted by other sources.³⁷

24. The Trial Chamber, by majority, rejected the Prosecution's First Request, "without prejudice to the Prosecution filing another application pursuant to Rule 68(2) of the Rules for this witness at a later stage, if considered necessary".³⁸ The Trial

Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, [Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19\(1\) of the Statute" of 10 March 2009](#), 16 September 2009, ICC-02/04-01/05-408 (OA3), paras 79-81; *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute"](#), 1 December 2014, ICC-01/04-01/06-3122 (A4 A6), paras 41-43; ICTY, Appeals Chamber, *Slobodan Milošević v. The Prosecutor*, [Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel](#), 1 November 2004, IT-02-54-AR73.7, para. 10. See also ICTY, Appeals Chamber, [The Prosecutor v. Vojislav Šešelj, Decision on appeal against decision on continuation of proceedings](#), 6 June 2014, IT-03-67-AR15bis, para. 35: "[...] even if a trial court has not otherwise erred, the appellate 'court must, if necessary, examine anew the relevant facts and circumstances to exercise a discretion by way of review if it thinks that the [Judges'] ruling may have resulted in injustice to the [appellant]'".

³² [Third Decision pursuant to Rule 68\(2\)\(b\)](#), para. 10.

³³ [Third Decision pursuant to Rule 68\(2\)\(b\)](#), para. 10.

³⁴ [Third Decision pursuant to Rule 68\(2\)\(b\)](#), para. 10.

³⁵ [Third Decision pursuant to Rule 68\(2\)\(b\)](#), para. 11.

³⁶ [Third Decision pursuant to Rule 68\(2\)\(b\)](#), para. 11.

³⁷ [Third Decision pursuant to Rule 68\(2\)\(b\)](#), para. 11.

³⁸ [Third Decision pursuant to Rule 68\(2\)\(b\)](#), para. 12.

Chamber agreed with the Defence that witness P-0113's prior recorded testimony relates to issues that are materially in dispute,³⁹ with the 39-page statement addressing a wide range of matters that go beyond background information.⁴⁰

25. Judge Prost dissented, stating that by excluding certain parts of witness P-0113's statement – those parts which go to the acts and conduct of the accused – the prior recorded testimony would be fully compliant with rule 68(2)(b) of the Rules.⁴¹ Furthermore, Judge Prost found that the discretionary factors under rule 68(2)(b)(i) of the Rules lean in favour of the introduction of witness P-0113's prior recorded testimony.⁴²

26. On 20 September 2021, the Prosecution filed another request under rule 68(2)(b) of the Rules on the basis that witness P-0113 was persistently unwilling to testify.⁴³

27. In the Impugned Decision, the Trial Chamber recalled that the decision of whether to introduce a witness' prior recorded testimony pursuant to rule 68(2)(b) of the Rules is a discretionary one, the purpose of which is to “identify situations where it is not necessary to examine witnesses, while preserving a fair and expeditious trial”.⁴⁴ Pursuant to rule 68(2)(b) of the Rules, introduction of prior recorded testimony is allowed only if it “goes to proof of a matter other than the acts and conducts of the accused”. The Trial Chamber held that “acts and conduct of the accused” refers to

[...] the personal actions and omissions of the accused as opposed to the acts and conduct of other persons which could be attributed to the accused by reason of the mode of liability charged. In this regard, the Majority further notes that even if the accused is not specifically named in the prior recorded testimony, the said testimony must be considered as going to the “acts and conduct of the accused” if the Prosecutor intends to rely on the relevant parts of the prior recorded testimony primarily for the purpose of establishing acts and conduct of the accused.⁴⁵

³⁹ [Third Decision pursuant to Rule 68\(2\)\(b\)](#), para. 12.

⁴⁰ [Third Decision pursuant to Rule 68\(2\)\(b\)](#), para. 12.

⁴¹ [Judge Prost's Partial Dissent to Third Decision](#), para. 6.

⁴² [Judge Prost's Partial Dissent to Third Decision](#), paras 8-12.

⁴³ [Impugned Decision](#), para. 9.

⁴⁴ [Impugned Decision](#), para. 11.

⁴⁵ [Impugned Decision](#), para. 12 (footnotes omitted).

28. Recognising that excluding certain paragraphs from a statement is permitted, the Trial Chamber held that partial introduction “must be assessed on a case-by-case basis, taking into account the particulars of the case as well as the prior recorded testimony in question”.⁴⁶ Furthermore, introduction of prior recorded testimony may only be permitted if “the reference to the acts and conduct of the accused is peripheral and discrete, *i.e.* not of significance to the case or of limited importance and does not constitute the core of the testimony sought to be introduced”.⁴⁷

29. With regard to witness P-0113’s prior recorded testimony, the Trial Chamber held that the paragraphs that the Prosecution sought to exclude are not “peripheral and discrete or can be detached from their context”, but rather are “part of a longer section in which P-0113 provides evidence regarding key aspects of the narrative concerning the criminal responsibility of the accused, such as the role of the Islamic Police and the interactions in between the various groups”.⁴⁸ As such, the Trial Chamber found that the paragraphs identified by the Prosecution “go to the very core of P-0113’s evidence”.⁴⁹ Moreover, the Trial Chamber held that “excluding the excerpts identified by the Prosecution, while retaining the remainder – most notably paragraphs immediately prior and after the identified excerpts – would distort the substance of the narrative of P-0113’s evidence, taken as a whole”.⁵⁰ The Trial Chamber concluded that a “piecemeal” approach to admission was “inapposite” under the circumstances.⁵¹

30. The Trial Chamber further held that the factors under rule 68(2)(b)(i) of the Rules “also play against the introduction of P-0113’s prior recorded testimony”.⁵² It found that the testimony goes beyond background information and it covers issues that are materially in dispute, “including a charged incident, the functioning of the various organs established by the armed groups including the Islamic police, as well as other alleged abuses”.⁵³ Second, the Trial Chamber determined that certain portions of the witness’ prior recorded testimony that do not directly mention the accused are

⁴⁶ [Impugned Decision](#), para. 13.

⁴⁷ [Impugned Decision](#), para. 13.

⁴⁸ [Impugned Decision](#), para. 14.

⁴⁹ [Impugned Decision](#), para. 14.

⁵⁰ [Impugned Decision](#), para. 14.

⁵¹ [Impugned Decision](#), para. 14.

⁵² [Impugned Decision](#), para. 15.

⁵³ [Impugned Decision](#), para. 16 (footnotes omitted).

nevertheless “proximate to the acts and conduct of the accused, particularly keeping in mind the mode of liability under which Mr Al Hassan is charged”.⁵⁴ Third, the Trial Chamber found that witness P-0113’s prior recorded testimony is not entirely corroborative or cumulative in nature.⁵⁵

31. Regarding the interests of justice factor under rule 68(2)(b)(i) of the Rules, the Trial Chamber held that the Prosecution failed to demonstrate how the introduction of witness P-0113’s prior recorded testimony would contribute to judicial economy.⁵⁶ Furthermore, while noting that “the truth seeking functions are of course of relevance”, the fact that a witness is unwilling to testify *viva voce*, on its own, is not a sufficient basis to allow the introduction of the witness’ prior recorded testimony, especially where the testimony is uncorroborated and related to issues materially in dispute.⁵⁷ The Trial Chamber observed that rule 68(2)(b) of the Rules is “a deviation from the general principle of orality enshrined in Article 69(2) of the Statute”, and its application requires a “cautious and stringent assessment, notably to ensure that the introduction of written testimony is not prejudicial to or inconsistent with the rights of the accused”.⁵⁸

32. In the majority of the Trial Chamber’s view, the introduction of witness P-0113’s prior recorded testimony does not serve the interests of justice and, in fact, would be prejudicial to the accused given that he cannot cross-examine the witness.⁵⁹ Accordingly, the Trial Chamber rejected the Prosecution’s Second Request.⁶⁰

33. Judge Prost dissented from the majority of the Trial Chamber. In her view, the specific circumstances of the case at hand – where a witness is unwilling to testify *viva voce* – is precisely the type of situation for which rule 68(2)(b) of the Rules was meant to be applied.⁶¹ Judge Prost would have authorized the introduction of witness P-0113’s

⁵⁴ [Impugned Decision](#), para. 16.

⁵⁵ [Impugned Decision](#), para. 17.

⁵⁶ [Impugned Decision](#), para. 18.

⁵⁷ [Impugned Decision](#), para. 18.

⁵⁸ [Impugned Decision](#), para. 18.

⁵⁹ [Impugned Decision](#), para. 19.

⁶⁰ [Impugned Decision](#), para. 19.

⁶¹ [Judge Prost’s Dissent to Impugned Decision](#), para. 2.

prior recorded testimony, with the paragraphs specifically referred to by the Prosecution excised.⁶²

B. First ground of appeal

1. Submissions of the Prosecution

34. The Prosecution submits that the Trial Chamber erred in law in defining the scope of the “acts and conduct” of the accused under rule 68(2)(b) of the Rules and in fettering its discretion beyond the plain terms of rules 68(1) and (2)(b).⁶³ As such, the Appeals Chamber should reverse the errors, and remand the matter back to the Trial Chamber for a new determination.⁶⁴ Recognising that the Trial Chamber is divided on its view regarding the two issues certified on appeal, the Prosecution submits that “[t]here can be no doubt [...] that the matters raised in this appeal materially affected the Decision”.⁶⁵

35. Under the first ground of appeal, the Prosecution submits that the Trial Chamber erred in regarding “all testimony which did not go to the acts and conduct of the accused, but instead related to the acts and conduct of third parties [...] as if it were evidence of the acts and conduct of the accused”.⁶⁶ Second, the Prosecution submits that the Trial Chamber erred when it “introduced irrelevant considerations into the strictly legal question of the definition of evidence which goes to the acts and conduct of the accused”.⁶⁷

36. Regarding the first alleged error under the first ground of appeal, the Prosecution submits that the analysis should focus on the “ordinary meaning” of the phrase “acts and conduct of the accused” – that is, the “personal acts and omissions of the accused, which are described in the charges against him or her or which are otherwise relied upon to establish his or her criminal responsibility for the crimes charged.”⁶⁸ Consistent with Judge Prost’s view, the Prosecution submits that the references to acts and conduct of persons other than the accused should be admissible even if the accused’s criminal

⁶² [Judge Prost’s Dissent to Impugned Decision](#), para. 12.

⁶³ [Appeal Brief](#), para. 4.

⁶⁴ [Appeal Brief](#), para. 4.

⁶⁵ [Appeal Brief](#), para. 3.

⁶⁶ [Appeal Brief](#), para. 8.

⁶⁷ [Appeal Brief](#), para. 8.

⁶⁸ [Appeal Brief](#), para. 12.

responsibility can be inferred from those persons' acts and omissions.⁶⁹ Thus, the Prosecution submits that "P-0113's evidence concerning the activities of the Islamic Police" was admissible, even if the testimony "permitted inferences as to Mr Al Hassan's criminal responsibility".⁷⁰

37. Regarding the second alleged error under the first ground of appeal, the Prosecution submits that the Trial Chamber committed a legal error when it confused the "Chamber's discretionary power (to admit prior recorded testimony in part) with the purely legal question of which parts of the prior recorded testimony (if any) actually went to the acts and conduct of the accused."⁷¹ The Prosecution submits that determining whether parts of the prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused is a "strictly legal question", which does not vary from case to case, contrary to the Trial Chamber's finding.⁷² The Prosecution adds that "while chambers must necessarily be vested with discretion whether to receive prior recorded testimony in part, the interests of justice – and especially the truth determining function of the Court – will usually favour doing so all other factors being equal".⁷³

38. Finally, the Prosecution submits that there was no need for the Trial Chamber to take a "broader approach to the definition of 'acts and conduct of the accused'", and there are "more than adequate safeguards to ensure that rule 68(2)(b) poses no particular risk of unfairness if prior recorded testimony going to the acts and conduct of persons other than the accused is admitted".⁷⁴

2. *Response of the Defence*

39. The Defence submits that the appeal should be dismissed because the Prosecution has failed to demonstrate a legal error or an abuse of discretion, or that the Impugned Decision was materially affected by any such error.⁷⁵

⁶⁹ [Appeal Brief](#), para. 16.

⁷⁰ [Appeal Brief](#), para. 17.

⁷¹ [Appeal Brief](#), para. 21.

⁷² [Appeal Brief](#), para. 21.

⁷³ [Appeal Brief](#), para. 23.

⁷⁴ [Appeal Brief](#), paras 25-27.

⁷⁵ [Defence's Response](#), para. 3.

40. With regard to the first ground of appeal, the Defence submits that the Trial Chamber properly defined the scope of the “acts and conduct of the accused”, consistent with rule 68(2)(b) of the Rules.⁷⁶ It submits that the Trial Chamber appeared to have narrowly applied the scope of the “acts and conduct of the accused” in the case of witness P-0113’s prior recorded testimony when it did not exclude paragraphs referring to the *mens rea* of Mr Al Hassan⁷⁷ in a manner consistent with the *Bemba et al.* precedent, which found such references inadmissible.⁷⁸

41. As for the inadmissibility of the partial prior recorded testimony of witness P-0113 because the excised paragraphs could not be “detached from their context”, the Defence submits there is “innate logic to this position” because “[i]f 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.”⁷⁹ Furthermore, the Defence submits that the Trial Chamber would “not be able to make a reliable assessment of the intrinsic coherence of a statement if parts, which speak directly to the witness’ knowledge, motives, and perspectives on the charged events, must be disregarded”.⁸⁰ The Defence stresses the importance of the power of the Trial Chamber to assess specific aspects of the witness’ testimony by reference to “the broader parameters and content of the witness’ written evidence, in its totality”.⁸¹

42. Finally, the Defence submits that the chamber’s “discretion must be exercised in a manner 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”.⁸²

⁷⁶ [Defence’s Response](#), para. 6.

⁷⁷ [Defence’s Response](#), para. 8.

⁷⁸ [Defence’s Response](#), para. 7.

⁷⁹ [Defence’s Response](#), para. 11.

⁸⁰ [Defence’s Response](#), para. 11.

⁸¹ [Defence’s Response](#), para. 13. *See also* para. 18: “[...] if the process of disaggregating evidence that concerns acts and conduct for the remainder of the witness’ testimony would unduly impede the ability of the Defence to contest either the coherence or reliability of the witness’ evidence or the Prosecution’s case concerning the knowledge, intent and participation of the defendant, then this constitutes ground to reject the application”.

⁸² [Defence’s Response](#), para. 17.

3. *Observations of the Victims*

43. The Victims agree with the Prosecution that the question of the admissibility of the witness statement of P-0113 should be sent back to the Trial Chamber for a new determination.⁸³

44. Regarding the first ground of appeal, the Victims agree that the knowledge of witness P-0113 of the acts of persons other than the accused himself – such as the members of the Islamic Police – does not fall under the exclusionary rule in rule 68(2)(b) of the Rules. The Victims further re-iterate the argument of the Prosecution that the Trial Chamber misinterpreted the legal test and imposed an incorrect standard when considering the “acts and conduct” of the accused.⁸⁴

4. *Determination by the Appeals Chamber*

45. The Prosecution argues that the inquiry into whether the Trial Chamber properly applied rule 68 of the Rules is a “strictly legal question”.⁸⁵ In support of this ground, the Prosecution advances two principal errors of law. First, the Prosecution submits that the Trial Chamber misapplied the definition of “acts and conduct of the accused”, erroneously expanding the concept to testimony about the acts and conduct of other persons.⁸⁶ Second, the Prosecution submits that the Trial Chamber conflated “the Chamber’s discretionary power (to admit prior recorded testimony in part) with the purely legal question of which parts of the prior recorded testimony (if any) actually went to the acts and conduct of the accused”.⁸⁷

46. As the Prosecution’s alleged errors under the first ground of appeal strike at the heart of the Trial Chamber’s understanding of rule 68 of the Rules, the Appeals Chamber finds it appropriate to first explain the operation of the Court’s regime governing the admission of prior recorded testimony in the absence of a witness.

47. The Appeals Chamber observes that rule 68(2) of the Rules applies in the event that the witness who gave previously recorded testimony is not present before the trial chamber. In that case, the chamber “may” allow the introduction of that previously

⁸³ [Victims’ Observations](#), para. 13.

⁸⁴ [Victims’ Observations](#), paras 6-9.

⁸⁵ [Appeal Brief](#), paras 8, 21. *See also* para. 30, alleging a “clear error of law”.

⁸⁶ [Appeal Brief](#), paras 8, 12-19.

⁸⁷ [Appeal Brief](#), paras 20-24.

recorded testimony, provided that the conditions in any of sub-rules (2)(a)-(d) are met. Rule 68(2)(b) of the Rules permits a chamber to allow the introduction of prior recorded testimony in the absence of a witness if that testimony “goes to proof of a matter other than the acts and conduct of the accused”. In such a case,

[i]n determining whether introduction of prior recorded testimony falling under sub-rule (b) may be allowed, the Chamber shall consider, *inter alia*, whether the prior recorded testimony in question:

- relates to issues that are not materially in dispute;
- is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;
- is such that the interests of justice are best served by its introduction; and
- has sufficient indicia of reliability.

48. The Appeals Chamber observes that the foregoing provisions create two incremental steps in the decision of a chamber about the admissibility of a prior recorded statement in the absence of a witness. When a chamber receives an application from a party relying on rule 68(2)(b) of the Rules, the chamber must first determine whether the prior recorded testimony in question relates to “proof of a matter other than the acts and conduct of the accused”. In the second stage, the chamber must turn its mind to the factors in rule 68(2)(b)(i) of the Rules, as well as any other factors that are relevant under the circumstances.⁸⁸

49. If the chamber answers the question under the first stage in the negative, it cannot advance to the second stage of the analysis under rule 68(2)(b)(i) of the Rules. That is, the presence of testimony going to proof of acts and conduct of the accused renders a written statement inadmissible. Nevertheless, the Appeals Chamber acknowledges that a chamber may find in its assessment of a written statement that it may take measures to reduce the prejudice that would otherwise result from the presence of testimony

⁸⁸ Before finally ruling in favour of admission of the prior recorded testimony, in whole or in part, under either sub-rule 68(2) or (3), a chamber must satisfy itself that doing so would not be prejudicial to or inconsistent with the rights of the accused (*see* rule 68(1) of the Rules: “the Trial Chamber may, in accordance with article 69(2) and (4) of the Statute, and after hearing the parties, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met”). *See also* “Determination by the Appeals Chamber” under the “Second Ground of Appeal”, *infra*.

going to proof of acts and conduct of the accused. Indeed, the Appeals Chamber considers that the language of the sub-rule does not foreclose the possibility that the whole statement may be divided with a view to relying upon only parts of the prior recorded testimony that do not relate to proof of the accused's acts and conduct.

50. The Appeals Chamber notes that, in prior decisions, the trial chambers of this Court have evaluated the appropriateness of partial admission under rule 68(2)(b) of the Rules on a case-by-case basis. Prior recorded testimony was found to be inadmissible where the testimony relating to the acts and conduct of the accused was “inseparable” from the remainder.⁸⁹ However, a reference to the accused that is only considered “incidental” in nature was not deemed to constitute an absolute bar to the admission of prior recorded testimony.⁹⁰ Moreover, even where there existed a reference to the accused in the testimony that is more than “incidental”, it did not necessarily follow that the statement could not be introduced when: (i) the calling party indicates that it does not intend to rely on that reference; and (ii) the reference is not of significance to the case or is, in any event, of limited importance and does not constitute the core of the prior recorded testimony.⁹¹

51. In sum, the Appeals Chamber observes that, in the first stage of a trial chamber's analysis under rule 68(2)(b) of the Rules, instead of rejecting the admission of the whole statement, the chamber may find it appropriate to admit parts of the statement that relate to proof of a matter other than the acts and conduct of the accused. The ultimate decision as to the appropriateness of admitting only parts of a statement is discretionary and depends upon the circumstances before the chamber.

⁸⁹ E.g. Trial Chamber I, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Decision on the “Prosecution’s consolidated application to conditionally admit the prior recorded statements and related documents of various witnesses under rule 68 and Prosecution’s application for the introduction of documentary evidence under paragraph 43 of the directions on the conduct of proceedings relating to the evidence of Witnesses P-0087 and P-0088”](#), 6 June 2017, ICC-02/11-01/15-950-Red, paras 71-72.

⁹⁰ See Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on Prosecution application for admission of prior recorded testimony of Witnesses P-0020, P-0057 and P-0932 under Rule 68\(2\)\(b\)](#), 18 January 2017, ICC-01/04-02/06-1730-Red, para. 9.

⁹¹ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68\(2\)\(b\) of the Rules](#), 18 November 2016, ICC-02/04-01/15-596-Red, para. 13; see also Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on admission of prior recorded testimony of Witness P-0773 under Rule 68](#), 27 February 2017, ICC-01/04-02/06-1667-Red (original confidential version filed on 2 December 2016), para. 12.

52. The Prosecution does not challenge the general definition of “acts and conduct of the accused” provided by the Trial Chamber.⁹² However, the Prosecution submits that the Trial Chamber misapplied the definition of “acts and conduct of the accused”, erroneously expanding the concept to prior recorded testimony about the acts and conduct of other persons.⁹³ In the Impugned Decision, the Trial Chamber recalled, generally, that “the expression ‘acts and conduct of the accused’ within the meaning of Rule 68(2) of the Rules should be interpreted as referring to the personal actions and omissions of the accused as opposed to the acts and conduct of other persons which could be attributed to the accused by reason of the mode of liability charged”.⁹⁴ The Trial Chamber further noted that prior recorded testimony that does not specifically mention the accused by name may nonetheless fall into the category of inadmissible testimony if the Prosecution intends to rely on it to prove acts and conduct of the accused.⁹⁵

53. The Trial Chamber then recalled that, in this case, the Prosecution itself acknowledged that there were “key paragraphs going to the acts and conduct of Mr Al Hassan”.⁹⁶ And after acknowledging that witness P-0113’s statement contained testimony about Mr Al Hassan’s acts and conduct, the Trial Chamber assessed whether those key paragraphs could be excluded from the whole statement. It concluded that those paragraphs were “part of a longer section in which P-0113 provides evidence regarding key aspects of the narrative concerning the criminal responsibility of the accused, such as the role of the Islamic Police and the interactions in between the various groups”.⁹⁷

54. Contrary to the Prosecution’s position, the Appeals Chamber finds that, as a matter of law, what constitutes prior recorded testimony going to proof of the “acts and conduct of the accused” under rule 68(2)(b) of the Rules may depend upon the nature

⁹² [Appeal Brief](#), para. 6.

⁹³ [Appeal Brief](#), paras 12-19.

⁹⁴ [Impugned Decision](#), para. 12.

⁹⁵ [Impugned Decision](#), para. 12.

⁹⁶ [Impugned Decision](#), para. 14. *See also* Prosecution’s Second Request, para. 39.

⁹⁷ [Impugned Decision](#), para. 14.

of the charges in each case.⁹⁸ Testimony used to prove the accused's acts and conduct may indeed describe the acts and conduct of the accused directly, or it may, for example, describe the acts and conduct of individuals in an organisation that the accused was an integral member of, or of individuals over whom he or she had authority.⁹⁹ Depending upon the nature of the allegations, the latter testimony may still fall into the category of evidence that may be used, together with other evidence, to prove acts and conduct of the accused.

55. Therefore, the Appeals Chamber rejects the categorical approach advocated by the Prosecution – namely, that rule 68(2)(b) of the Rules must not operate to exclude, under any circumstances, prior recorded testimony about individuals other than the accused that may nevertheless be relied upon to prove the acts and conduct of the accused. Ultimately, prior recorded testimony going to proof of “the acts and conduct of the accused” must be interpreted in a manner consistent with the exceptional nature of rule 68 of the Rules as a whole.¹⁰⁰ Trial chambers must be mindful that that criterion is included as a safeguard for the conduct of a fair trial in full equality. On the other hand, trial chambers must be careful not to apply this concept in a manner that may defeat the objective of rule 68 of the Rules,¹⁰¹ or that may inhibit written testimony that

⁹⁸ See ICTY, Appeals Chamber, *The Prosecutor v. Stanislav Galić*, [Decision on Interlocutory Appeal Concerning Rule 92bis\(C\)](#), 7 June 2002, Case No. IT-98-AR73.2 (hereinafter: “*Galić* Decision concerning Rule 92bis”), para. 10.

⁹⁹ See, e.g., ICTR, Trial Chamber, *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nziirorera*, [Decision on Prosecutor's Motion to Admit Witness Statement from Joseph Serugendo](#), 15 December 2006, ICTR-98-44-T, para. 9: “Throughout the Abridged Statement, the Accused were implicitly referred to in a variety of ways, such as ‘certain personalities of the government and the MRND party’, ‘MRND Party Leadership’, ‘MRND authorities’, ‘Senior Officials of the MRND Party’, and ‘Interim Government’. An Accused need not be specifically named for statements to be held as going to the acts or conduct of the Accused, and in this case, it is the Prosecution's assertions that the Accused committed the crimes charged ‘by using their power and authority as high level MRND political party leaders and their status as current or former ministers of government to recruit, indoctrinate, arm, train, and mobilize Hutu militiamen and ordinary Hutu citizens, mostly subsistence farmers, to attack, harm and destroy the Tutsi population of Rwanda during the period 1990- 1994’. The Chamber finds that these expressions, found under each of the four substantive headings in Mr. Serugendo's statement, do go to the acts and conduct of the Accused”.

¹⁰⁰ Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Judgment on the Decision on the Admission of Prior Recorded Testimony under Rule 68](#), 12 February 2016, ICC-01/09-01/11-2024 (OA10), para. 84: “[...] the Appeals Chamber considers that rule 68 of the Rules is an exception to the principle of orality enshrined in article 69(2) of the Statute”.

¹⁰¹ [Working Group of Lessons Learnt: Second report of the Court to the Assembly of States Parties, 20-28 November 2013, ICC-ASP/12/37/Add.1](#), Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), Annex II.A, para. 8: “The proposed amendment is intended to reduce the length of ICC proceedings and to streamline evidence presentation [...]”.

is limited to contextual elements of crimes or background information that may be relevant to the charges. Indeed, the Appeals Chamber observes that in the practice of the ICTY, prior recorded testimony was more appropriate for what is known as “crime-base” evidence,¹⁰² rather than for the testimony of insider witnesses with knowledge of the accused.

56. The Prosecution further submits that the Trial Chamber confused “the Chamber’s discretionary power (to admit prior recorded testimony in part) with the purely legal question of which parts of the prior recorded testimony (if any) actually went to the acts and conduct of the accused”.¹⁰³

57. As explained above, a trial chamber exercises discretion in its determination as to whether admission of part of a statement is appropriate notwithstanding the presence, in other parts, of testimony relating to the acts and conduct of the accused.¹⁰⁴ Generally speaking, the judges of the trial chamber are best-placed to make this determination given their familiarity with the allegations in the case and their appreciation of the effect that allowing partial admission would have on the right of the accused to test the evidence.

58. However, the Appeals Chamber emphasises that proceeding by way of partial admission may in some cases be, in principle, an efficient method of preserving a fair trial for the accused while still meeting the legislative objective behind rule 68 of the Rules.¹⁰⁵ At the first stage of the admissibility analysis under rule 68(2)(b) of the Rules, as explained above, a trial chamber is primarily concerned with identifying testimony going to “proof of a matter other than acts and conduct of the accused”. When the

¹⁰² [Galić Decision concerning Rule 92bis](#), para. 16.

¹⁰³ [Appeal Brief](#), paras 20-24.

¹⁰⁴ See, in this sense, ICTY, Appeals Chamber, *The Prosecutor v. Slobodan Milošević*, [Decision on interlocutory appeal of the Trial Chamber’s decision on the assignment of defense counsel](#), 1 November 2004, IT-02-54-AR73.7, para. 9: “As the Appeals Chamber has previously noted, a Trial Chamber exercises its discretion in many different situations such as when imposing sentence, in determining whether provisional release should be granted, in relation to the admissibility of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure”; ICTY, Appeals Chamber, *The Prosecutor v. Zlatko Aleksovski*, [Decision on Prosecutor’s appeal on admissibility of evidence](#), 16 February 1999, IT-95-14/1-A, para. 15.

¹⁰⁵ [Working Group of Lessons Learnt: Second report of the Court to the Assembly of States Parties, 20-28 November 2013, ICC-ASP/12/37/Add.1](#), Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), Annex II.A, para. 8: “The proposed amendment is intended to reduce the length of ICC proceedings and to streamline evidence presentation [...]”.

question of partial admission arises in the litigation, the trial chamber may evaluate the statement with a view to identifying whether there are significant parts of the statement concerned that may not be used to prove the accused's acts and conduct. If a chamber considers partial admission at this stage, it should give clear reasons as to why the presence of testimony relating to the acts and conduct of the accused renders partial admission inappropriate.

59. In the Impugned Decision, the Trial Chamber held that the paragraphs relating to the acts and conduct of Mr Al Hassan could not be severed from the whole statement. In so deciding, the Trial Chamber explained that those paragraphs “go to the very core of P-0113's evidence” and could not be “detached from their context”.¹⁰⁶ Excluding those paragraphs, according to the Trial Chamber, “would distort the substance of the narrative of P-0113's evidence, taken as a whole”.¹⁰⁷

60. The Appeals Chamber finds that the Trial Chamber did not provide sufficient reasons for its determination under rule 68(2)(b) of the Rules. In this regard, the Appeals Chamber observes that the Trial Chamber determined that some limited parts of the statement do, in fact, relate to the acts and conduct of Mr Al Hassan. However, that “key aspects of [other parts of] the narrative” may “concern[...] the criminal responsibility of the accused”, generally, is not itself sufficient to bar admission pursuant to rule 68(2)(b) of the Rules. Nor is it enough that the testimony sought to be introduced goes to “the very core of P-0113's evidence”.¹⁰⁸

61. The Appeals Chamber finds that the prevailing interest inherent in rule 68(2)(b) of the Rules is not that the Trial Chamber ought to preserve the “substance of the narrative” in the statement. And the threshold for the admissibility of prior recorded testimony is not avoided because partial admission would cause those parts of the narrative to be “distorted” or “detached from their context”. Rather, the Appeals Chamber reiterates that the correct legal test under the first stage of rule 68(2)(b) of the Rules requires a trial chamber to determine whether the statement contains testimony that goes to proof of a matter other than the acts and conduct of the accused.

¹⁰⁶ [Impugned Decision](#), para. 14.

¹⁰⁷ [Impugned Decision](#), para. 14.

¹⁰⁸ [Impugned Decision](#), para. 14.

62. The Prosecution, for its part, argues that the Trial Chamber took into account irrelevant factors in its analysis.¹⁰⁹ Though this may indeed be the case, the Appeals Chamber finds that at the very least the Trial Chamber did not clearly explain whether it had assessed the bulk of P-0113's statement with a view to determining whether certain paragraphs therein relate to proof of the acts and conduct of Mr Al Hassan. This failure to provide sufficient reasons constitutes an error of law. Judge Ibáñez disagrees on this point. As it is further explained in her dissenting opinion, in Judge Ibáñez's view, the lack of reasoning reveals that no proper assessment was made. In her view, this constitutes the real error of law in this case.

63. Nevertheless, as explained above, the Appeals Chamber will not interfere with the decision of a trial chamber unless it finds that there is an error that materially affected the outcome in the decision appealed from. In this regard, the Appeals Chamber notes that a number of the considerations expressed in the Impugned Decision under the first stage of the analysis under rule 68(2)(b) of the Rules – though not strictly relevant to whether the prior recorded testimony relates to proof of the accused's acts and conduct – may indeed be relevant to the second stage of the analysis under rule 68(2)(b)(i) of the Rules. The Appeals Chamber also weighs heavily the fact that the Trial Chamber conducted a full analysis of the criteria in rule 68(2)(b)(i) of the Rules – though not necessary to the Chamber's conclusion – and found that a number of the considerations revealed prejudice to the rights of the accused should the prior recorded testimony be admitted. Of particular note is the finding that P-0113's evidence "touches on a significant range of materially disputed issues", and that it is "not entirely corroborative or cumulative in nature".¹¹⁰

64. Thus, the Appeals Chamber finds that even if the Trial Chamber had not erred as identified above, the outcome in the Impugned Decision would have been the same. That is, the error does not materially affect the decision as a whole or, in particular, the conclusion reached by the Trial Chamber under rule 68(2)(b)(i) of the Rules. Therefore, the Appeals Chamber, Judge Ibáñez dissenting, finds that it would not be appropriate to interfere with the Impugned Decision on this basis. According to Judge Ibáñez, the Trial Chamber should have first examined what paragraphs go to the acts and conduct

¹⁰⁹ [Appeal Brief](#), para. 8.

¹¹⁰ [Impugned Decision](#), paras 16-17.

of the accused, and which do not. Only after conducting this assessment, was the Trial Chamber entitled to go to the discretionary elements contained under rule 68(2)(b)(i). In Judge Ibáñez's view, this error of law had a material impact on the decision and its outcome, as it is further elaborated in the dissenting opinion attached to this judgment.

65. Finally, the Prosecution devotes several paragraphs in the Appeal Brief to the argument that rule 68(2)(b) of the Rules “poses no particular risk of unfairness if prior recorded testimony going to the acts and conduct of persons other than the accused is admitted”.¹¹¹ In support of this argument, the Prosecution points out that (i) the accused has a direct right of appeal under article 81 of the Statute concerning the final assessment of the evidence;¹¹² and (ii) convictions may not rely solely or in a decisive manner on the evidence of a witness whom the accused had no opportunity to examine.¹¹³

66. The Appeals Chamber finds, Judge Ibáñez dissenting, that the Prosecution's arguments are not on point. The fact that there may be adequate safeguards in the Court's legal framework to prevent unfairness following the admission of prior recorded testimony is not in dispute, and the Trial Chamber made no pronouncement on this in the Impugned Decision. The Trial Chamber did not decline to admit prior recorded testimony *per se*. Rather, the Trial Chamber examined the concrete circumstances of this particular case and found that partial admission of witness P-0113's statement was not appropriate. As the Prosecution has not demonstrated that this decision was carried out improperly, its argument in this regard is rejected. Judge Ibáñez, for the reasons given above, dissents on this point.

5. Conclusion

67. For the foregoing reasons, the Appeals Chamber, Judge Ibáñez dissenting, rejects the first ground of appeal.

¹¹¹ [Appeal Brief](#), paras 25-29.

¹¹² [Appeal Brief](#), para. 28.

¹¹³ [Appeal Brief](#), para. 29.

C. Second ground of appeal

1. Submissions of the Prosecution

68. Regarding the second ground of appeal, the Prosecution submits that the Trial Chamber improperly took the view that the principle of orality in article 69(2) and the right of the accused to confront a witness in article 67(1)(e) of the Statute require a “stringent” assessment of the requirements for the introduction of prior recorded testimony under rule 68(2)(b) of the Rules.¹¹⁴ The Prosecution notes that the Court has described rule 68 of the Rules as an “exception” to the principle of orality,¹¹⁵ but argues that the Trial Chamber nonetheless erred in fettering its discretion beyond the plain terms of rule 68(1) and (2)(b) of the Rules.¹¹⁶ The Prosecution submits that this erroneous assumption “tainted all of the Majority’s reasoning concerning its discretion under rule 68(2)(b)”.¹¹⁷

69. The Prosecution concedes that rule 68 of the Rules “may technically be an exception to the default rule in article 69(2)”, but argues that “nothing says that it must be applied ‘exceptionally’ or ‘restrictively’”.¹¹⁸ Citing to Judge Prost’s dissent, the Prosecution avers that rule 68(2)(b) should not be viewed as an exceptional means of admitting evidence in the Court’s hybrid system, but merely a “different form of evidence authorised” under the Statute.¹¹⁹

70. Furthermore, the Prosecution submits that rule 68(1) of the Rules already limits a chamber’s exercise of discretion in admitting prior recorded testimony under rule 68(2)(b) by ensuring that admission of the evidence “would not be prejudicial to or inconsistent with the rights of accused”.¹²⁰ Consequently, there is no legal justification for a chamber to further “fetter its discretion”¹²¹ by assessing the discretionary factors under rule 68(2)(b) of the Rules in a “cautious” or “stringent” manner when determining

¹¹⁴ [Appeal Brief](#), para. 31.

¹¹⁵ [Appeal Brief](#), para. 33.

¹¹⁶ [Appeal Brief](#), paras 32-33.

¹¹⁷ [Appeal Brief](#), para. 32. *See also* para. 46: “[...] the tenor of the reasoning in the [Impugned Decision] illustrates [the Trial Chamber’s] undue hesitancy in this case”.

¹¹⁸ [Appeal Brief](#), para. 33.

¹¹⁹ [Appeal Brief](#), para. 34.

¹²⁰ [Appeal Brief](#), para. 35.

¹²¹ [Appeal Brief](#), para. 45.

whether to allow the introduction of a prior recorded testimony that does not go to proof of a matter other than the acts and conduct of the accused.¹²²

2. *Response of the Defence*

71. The Defence submits, at the outset, that this ground of appeal should be dismissed given that any error by the Trial Chamber did not vitiate the outcome of the Impugned Decision.¹²³ Furthermore, according to the Defence, the Prosecution failed to demonstrate that “no reasonable Trial Chamber could have reached such an outcome on the basis of the information before it”.¹²⁴ Finally, the Defence submits that the Court’s legal framework and jurisprudence have established and recognised the general principle of orality under article 69 of the Statute, with the “strict” provision of rule 68 as an exception and subject to a “cautious” assessment.¹²⁵ There is no “definitional difference between a rule being qualified as an exception, and applying a rule on an exceptional basis”.¹²⁶

72. With regard to the “cautious and stringent assessment” of the discretionary factors, the Defence submits that it merely informs a trial chamber of its consideration of the discretionary factors, but in no way does it presuppose a specific result.¹²⁷ Furthermore, in the Defence’s view, a trial chamber has been vested with broad discretion in its consideration of the discretionary factors under rule 68(2)(b) of the Rules, with the exercise of discretion in this matter conducted carefully and reasonably.¹²⁸ Finally, the Defence contends that the right of a defendant to confront its accuser is an internationally recognised human right and, as such, reliance on written evidence, in lieu of oral evidence, should be done only as a last resort.¹²⁹ Therefore, the Defence requests that the Appeals Chamber reject the Prosecution’s appeal.¹³⁰

¹²² [Appeal Brief](#), paras 39, 45.

¹²³ [Defence’s Response](#), para. 28.

¹²⁴ [Defence’s Response](#), para. 29.

¹²⁵ [Defence’s Response](#), para. 31.

¹²⁶ [Defence’s Response](#), para. 36.

¹²⁷ [Defence’s Response](#), para. 36.

¹²⁸ [Defence’s Response](#), para. 35.

¹²⁹ [Defence’s Response](#), para. 37.

¹³⁰ [Defence’s Response](#), para. 38.

3. *Observations of the Victims*

73. The Victims agree with the Prosecution that a chamber must not go beyond the standards imposed by rule 68 of the Rules in order to comply with article 69(2) of the Statute.¹³¹ The Victims concur with the Prosecution that the “tenor of the reasoning in the Decision illustrates its undue hesitancy in this case”.¹³²

4. *Determination by the Appeals Chamber*

74. The Prosecution focuses on the Trial Chamber’s finding that rule 68(2)(b) of the Rules is a “deviation from the general principle of orality enshrined in Article 69(2) of the Statute”, and that recourse to rule 68(2)(b) “requires the conduct of a cautious and stringent assessment, notably to ensure that the introduction of written testimony is not prejudicial to or inconsistent with the rights of the accused”.¹³³ The Prosecution argues that this finding is “legally erroneous”,¹³⁴ and that the finding caused the Trial Chamber to “fetter its discretion” and “tainted all of the [Trial Chamber]’s reasoning concerning its discretion under rule 68(2)(b)”.¹³⁵ For the reasons that follow, the Appeals Chamber is unpersuaded by the Prosecution’s argument.

75. One of the fundamental fair trial guarantees in proceedings at this Court is the right to confront a witness about his or her testimony under article 67(1)(e) of the Statute.¹³⁶ This has been interpreted in human rights jurisprudence to mean that, as an extension of the principle of equality of arms, a defendant in criminal proceedings must be given an effective opportunity to question and challenge the witness giving incriminating evidence.¹³⁷ Moreover, as part of its duty under the Statute to ensure a

¹³¹ [Victims’ Observations](#), paras 10-11.

¹³² [Victims’ Observations](#), para. 12.

¹³³ [Impugned Decision](#), para. 18.

¹³⁴ [Appeal Brief](#), para. 32.

¹³⁵ [Appeal Brief](#), para. 32; see also para. 46: “[...] the tenor of the reasoning in the [Impugned Decision] illustrates [the Trial Chamber’s] undue hesitancy in this case”.

¹³⁶ This provision states, in pertinent part: “In the determination of any charge, the accused shall be entitled [...] to the following minimum guarantees, in full equality:

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her [...].”

¹³⁷ United Nations, Human Rights Committee (Committee on Civil and Political Rights), [Gordon v. Jamaica, Communication No. 237/1987, U.N. Doc. CCPR/C/46/D/237/1987, 5 November 1992, 45th session](#), para 6.2; Human Rights Committee, [General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32, 23 August 2007](#), , para 39; ECtHR, Grand Chamber, *Al-Khawaja and Tahery v. The United Kingdom*, ‘[Judgment](#)’, 15 December

fair and expeditious trial,¹³⁸ a trial chamber must decide on the manner of questioning of witnesses so as to “make the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth”.¹³⁹ Indeed, not only does an accused have the right to examine a witness under the Statute, but he or she also has the right to be the last to examine a witness.¹⁴⁰

76. In addition to article 67(1)(e) of the Statute, the opportunity for an accused to examine a witness in court is also derived from article 69(2) of the Statute, governing testimonial evidence: “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”. This provision gives effect to the principle of orality and creates a general rule that evidence be given in court, orally from the witness.¹⁴¹

77. The inclusion of this preference for live witness testimony twice in the Statute – in article 67 (“Rights of the accused”), and in article 69 (“Evidence”) – gives effect to the opportunity for an accused person to examine a witness directly, in full equality. Moreover, when a witness appears in person to testify against the accused, that witness may be questioned by the accused or by the trial chamber about any matter that may affect the credibility of the witness or the reliability of his or her testimony. This practice is essential to the integrity of judicial fact-finding during the chamber’s final assessment of the evidence.

78. Nevertheless, the right to confront a witness, as also recognised in human rights law, is not absolute. It can be restricted by law if the limitation is directed at a legitimate aim and only so far as is strictly necessary to achieve that aim.¹⁴² Article 69(2) of the Statute recognises that in some cases a chamber may receive testimony other than in-court personal testimony, to the extent that the Statute and Rules so allow.¹⁴³ Rule 68(2)

[2011, applications nos. 26766/05 and 22228/06](#), para. 127. *See also* ICCPR, Article 14(3)(e); ACHR, article 8(2)(f); ECHR, article 6(3)(d).

¹³⁸ *See* article 64(2) of the Statute.

¹³⁹ Regulation 43 of the Regulations of the Court

¹⁴⁰ Rule 140(2)(d) of the Rules of Procedure and Evidence.

¹⁴¹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the Appeals against the Decision on the Admission of Evidence](#), 3 May 2011, ICC-01/05-01/08-1386 (OA5 OA6), para. 76.

¹⁴² *See*, in this sense, ECtHR, [Van Mechelen and others v. The Netherlands](#), ‘Judgment’, 23 April 1997, [application nos. 21363/93, 21364/93, 21427/93 and 22056/93](#), para. 58.

¹⁴³ Article 69(2) of the Statute reads as follows:

of the Rules provides that a party may apply to introduce prior recorded testimony in the absence of a witness. While the Appeals Chamber, Judge Ibáñez dissenting, recognises that the aims of this rule – namely facilitating expeditious trial proceedings –¹⁴⁴ are legitimate, it must be emphasised that this constitutes a limitation on the right to confront a witness as described above, substantially restricting an internationally recognised and fundamental fair trial right. In the view of the Appeals Chamber, if not applied with due care, rule 68 of the Rules may create tension with the right to confront a witness and the broader principle of equality of arms. Judge Ibáñez dissents on this point. While she notes the accused’s right to cross-examine a witness, this particular fair trial right is not affected in this case. The introduction of prior recorded testimony is not an exception to cross-examination, as such, as the prior recorded testimony is another type of evidence. For the same reason, the principle of equality of arms is not affected here.

79. Indeed, this Court is bound to interpret and apply rule 68 of the Rules – a subordinate norm to articles 67(1)(e) and 69(2) of the Statute –¹⁴⁵ in a manner that is consistent with internationally recognised human rights norms.¹⁴⁶ The fact that exceptions must limit the right only so far as “strictly necessary”, and there must be good reasons provided for resorting to prior recorded testimony,¹⁴⁷ compels a careful

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 Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.

¹⁴⁴ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)”](#), 1 November 2016, ICC-02/11-01/15-744 (OA8), paras 58-61; Working Group on Lessons Learnt: Second report of the Court to the Assembly of States Parties, 20-28 November 2013, ICC-ASP/12/37/Add.1, [Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence \(Prior Recorded Testimony\)](#), Annex II.A, para. 8: “The proposed amendment is intended to reduce the length of ICC proceedings and to streamline evidence presentation”.

¹⁴⁵ See article 51(5) of the Statute.

¹⁴⁶ Article 21(3) of the Statute.

¹⁴⁷ According to the case-law of the ECtHR, pre-recorded testimonies, which do not allow for cross examination and, therefore, restrict the defendant’s right to effectively challenge the evidence presented against him, can only be admitted as a “measure of last resort” when the witness has not being able to appear before the court at any prior stage; such restrictions must take into account the reasons for the non-attendance of witnesses and equally importantly the availability of alternative evidence and other procedural guarantees to ensure overall fairness of the proceeding. See ECtHR, *Seton v. The United Kingdom*, [Judgment](#), 12 September 2016, application no. 55287/10, para. 58 *citing Al-Khawaja and Tahery v. The United Kingdom*, [Judgment](#), 15 December 2011, applications

interpretation of the criteria in rule 68 of the Rules. This interpretive guidance is built into the language of the Statute and Rules. The alternative means of presenting testimony listed in article 69(2) of the Statute must “not be prejudicial to or inconsistent with the rights of the accused”. The same consideration is present in rule 68(1) of the Rules, this time specifically in respect of the introduction of prior recorded testimony.¹⁴⁸ Finally, and even more to the point, rule 68(2)(b) of the Rules lists a number of criteria that a chamber must consider in its decision on admissibility. These criteria are, for the most part, aimed at reducing prejudice to the rights of the accused. In Judge Ibáñez’s view, there is no prejudice in this case.

80. In the view of the Appeals Chamber, Judge Ibáñez dissenting, it follows that rule 68 of the Rules must be treated as an exception to the principle of orality in article 69(2) of the Statute,¹⁴⁹ and a trial chamber should take into account the exceptional nature of that rule as a whole in the interpretation and application of the individual criteria in rule 68 of the Rules. In this regard, the Appeals Chamber observes that the rights spelled out in article 67 of the Statute constitute “minimum guarantees”. Any rule derogating from these minimum fair trial guarantees warrants interpretation in a restrictive manner.

81. Also, it may become apparent to a chamber that even once the criteria in rule 68 of the Rules are satisfied, there are other reasons why the nature of the prior recorded testimony still threatens the fairness of the proceedings should the witness not appear for cross-examination.¹⁵⁰ This eventuality is accounted for in part by the words “*inter alia*” in rule 68(2)(b)(i) of the Rules, suggesting that there may be other factors, in addition to those listed, that a chamber must consider in its overarching duty to address the fairness to the accused of admitting prior recorded testimony in the absence of a witness. This is also accounted for in the *chapeaux* in rule 68(1) and (2) of the Rules,

nos. 26766/05 and 22228/06, paras 119-147; ECtHR, *Dimović v. Serbia*, [Judgment](#), 28 September 2016, application no. 24463/11, paras 36-38; ECtHR, *T.K. v. Lithuania*, [Judgment](#), 3 December 2018, application no. 14000/12, para. 95.

¹⁴⁸ Rule 68(1) of the Rules state, in pertinent part: a trial chamber may allow the introduction of prior recorded testimony “provided that this would not be prejudicial to or inconsistent with the rights of the accused [...]”.

¹⁴⁹ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Judgment on the Decision on the Admission of Prior Recorded Testimony under Rule 68](#), 12 February 2016, ICC-01/09-01/11-2024 (OA10), para. 84: “[...] the Appeals Chamber considers that rule 68 of the Rules is an exception to the principle of orality enshrined in article 69(2) of the Statute”.

¹⁵⁰ See article 64(2) of the Statute: “The Trial Chamber shall ensure that a trial is fair and expeditious and is concluded with full respect for the rights of the accused and due regard for the protection of victims and witnesses”.

which set the pre-conditions for the introduction of prior recorded testimony in the absence of a witness, both stating that a chamber “may” allow the introduction of previously recorded testimony if the factors listed in rule 68 are satisfied. The use of the word “may” clearly indicates that, in the proper exercise of its discretion, a chamber may elect to reject the introduction into evidence of prior recorded testimony that otherwise meets all of the criteria listed in the applicable sub-rule. Indeed, the Appeals Chamber considers that such a course of action should indeed be taken if it is necessary, in the view of a chamber, to ensure a fair trial.

82. Given the dangers inherent in admitting, without cross-examination, a written witness statement for the purpose of supporting a party’s case (and particularly the case of the Prosecution),¹⁵¹ a Chamber must carefully assess the criteria in rule 68(2)(b) of the Rules as well as any other criteria that may be relevant to adequately mitigate the prejudice to the accused. The Appeals Chamber has, in the past, characterised the trial chamber’s exercise of discretion in this manner as a “cautious assessment”.¹⁵² The Appeals Chamber has also found that rule 68 of the Rules, generally, sets out “strict conditions”¹⁵³ and requires “stringency”.¹⁵⁴ In particular, the Appeals Chamber considered that where the statement of a witness relates to “issues that are materially in

¹⁵¹ See ICTY, Appeals Chamber, *The Prosecutor v. Stanislav Galić*, [Decision on Interlocutory Appeal Concerning Rule 92bis\(C\)](#), 7 June 2002, Case No. IT-98-AR73.2, paras 28-30; See also O’Sullivan and Montgomery, ‘The Erosion of the Right to Confrontation under the Cloak of Fairness at the ICTY’, 8 *Journal of International Criminal Justice* (2010), p. 511 at p. 517: “[t]he limitation on the nature and scope of the evidence admissible under Rule 92bis reflects a concern for the reliability of the material prepared by a party for the purposes of trial proceedings, instead of oral evidence from the makers of the statements”. See also ECtHR, *Daştan v. Turkey*, ‘Judgment’, 10 October 2017, application no. 37272/08, para. 31.

¹⁵² *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the diction of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)”](#), 1 November 2016, ICC-02/11-01/15-744 (OA8), para. 65; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Judgment on the Decision on the Admission of Prior Recorded Testimony under Rule 68](#), 12 February 2016, ICC-01/09-01/11-2024 (OA10), para. 85; *Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the Appeals against the Decision on the Admission of Evidence](#), 3 May 2011, ICC-01/05-01/08-1386 (OA5 OA6), para. 78.

¹⁵³ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the diction of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)”](#), 1 November 2016, ICC-02/11-01/15-744 (OA8), para. 65; *Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the Appeals against the Decision on the Admission of Evidence](#), 3 May 2011, ICC-01/05-01/08-1386 (OA5 OA6), para. 77.

¹⁵⁴ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Judgment on the Decision on the Admission of Prior Recorded Testimony under Rule 68](#), 12 February 2016, ICC-01/09-01/11-2024 (OA10), para. 86.

dispute, central to core issues of the case or are uncorroborated, a Chamber must be extra vigilant that introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally”.¹⁵⁵

83. The Prosecution concedes that rule 68 of the Rules is an exception to the principle of orality while taking the position that it must not be applied “exceptionally”, “restrictively”, or with “heightened scrutiny”.¹⁵⁶ The Prosecution also accepts the jurisprudence instructing that rule 68 of the Rules manifests a certain “stringency” while denying that such a quality translates into a “stringent” application of rule 68’s provisions.¹⁵⁷ The Appeals Chamber finds that irrespective of the adjectives or other qualifying words employed, the important take-away is that the chamber’s overarching duty to ensure compliance with an accused’s procedural rights requires a careful analysis of all relevant factors for and against the admission of prior recorded testimony in the absence of a witness. The particular words used to describe this assessment are of little legal significance, and to quibble with the language would be to ignore the importance of the assessment itself.

84. Therefore, the Appeals Chamber finds that the Trial Chamber was correct in considering that recourse to rule 68 of the Rules “requires the conduct of a cautious and stringent assessment, notably to ensure that the introduction of written testimony is not prejudicial to or inconsistent with the rights of the accused”.¹⁵⁸

85. Finally, the Prosecution further alleges that the Trial Chamber erred in law when considering that article 69(2) of the Statute “requires a chamber to fetter its discretion beyond the plain terms of rule 68(1) and 2(b) itself”.¹⁵⁹ However, the Appeals Chamber, Judge Ibáñez dissenting, can find no indication that the Trial Chamber misapplied rule 68(2)(b) of the Rules in this manner. The Trial Chamber considered the importance of the prior recorded testimony and then assessed the impact of the admission of the

¹⁵⁵ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the diction of Trial Chamber I of 9 June 2016 entitled “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68\(2\)\(b\) and 68\(3\)”](#), 1 November 2016, ICC-02/11-01/15-744 (OA8), para. 69.

¹⁵⁶ [Appeal Brief](#), paras 33, 38, 41.

¹⁵⁷ [Appeal Brief](#), para. 31.

¹⁵⁸ [Impugned Decision](#), para. 18.

¹⁵⁹ [Appeal Brief](#), paras 31-34.

testimony on the rights of the accused. And even after finding against partial introduction of the evidence based on the foregoing, it in any event reinforced this conclusion with its analysis of the factors listed in rule 68(2)(b)(i) of the Rules. In Judge Ibáñez's views, for the reasons above and those further elaborated in her dissenting opinion, the Trial Chamber misapplied rule 68(2)(b)(i) of the Rules.

86. Far from stretching the plain terms of the rule, the Appeals Chamber finds that the approach taken by the Trial Chamber fully comports with the discretion granted to a chamber by virtue of rule 68 of the Rules as a whole. Thus, the Appeals Chamber, Judge Ibáñez dissenting, sees no reason to conclude that the Trial Chamber misapplied it.

5. Conclusion

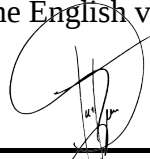
87. For the foregoing reasons, the Appeals Chamber, Judge Ibáñez dissenting, rejects the Prosecution's second ground of appeal.

VII. APPROPRIATE RELIEF

88. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed. In the present case, it is appropriate to confirm the Impugned Decision.

Judge Ibáñez appends a dissenting opinion to this judgment.

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



Judge Luz del Carmen Ibáñez Carranza
Presiding



Judge Piotr Hofmański



Judge Solomy Balungi Bossa



Judge Rosario Salvatore Aitala



Judge Gocha Lordkipanidze

Dated this 13th day of May 2022

At The Hague, The Netherlands